80-846

No.

Supreme Court, U. S.
FILED
NOV 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE,
Petitioner,

v.

NOAH H. LUNDY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM M. LEECH, JR.
ATTORNEY GENERAL
STATE OF TENNESSEE

JOHN C. ZIMMERMANN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3231

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Whether a petition for relief under 28 U.S.C. 2254 should be dismissed, without prejudice, where the petition presents several claims for relief but where one or more of the claims have not been presented to the state courts thereby failing to satisfy the exhaustion requirements of 28 U.S.C. 2254(b).

2. Whether habeas corpus relief was properly granted to the respondent on the grounds of prosecutorial misconduct and an improper jury instruction where these issues were waived by the respondent's failure to demonstrate cause and prejudice for his procedural defaults.

3. Whether this case should be remanded to the district court which granted habeas corpus relief without considering the entire State trial transcript and where the petitioner requested such relief before the court of appeals.

4. Whether the respondent's right of confrontation was abridged when the state trial court limited his cross-examination of the rape victim concerning her prior statements to his defense counsel but where the respondent's offer of proof at his state trial demonstrated that a proper foundation could not be laid for admission of the prior statements.[1]

---

[1] Former Warden Vinson Thompson and the Attorney General of Tennessee were originally named as respondents in the District Court. In April 12, 1979, Jim Rose was substituted for Vinson Thompson pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Authorities	iii
Opinions Below	1
Grounds on which Jurisdiction is Invoked	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Petition	10
Conclusion	18
Appendix	A-1

TABLE OF AUTHORITIES

Cases Cited

Aston v. Warden, Powhatan Correctional Center, 574 F.2d 1169 (4th Cir. 1978)	15
Browder v. Director, Department of Correction of Illinois, 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978)	14
Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 2d 347 (1974)	17
Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)	13,14
Edwards v. State, 540 S.W.2d 641 (Tenn. 1976), *cert den.*, 429 U.S. 1061, 97 S.Ct. 784, 50 L.Ed.2d 777 .	13

Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976) 12

Francisco v. Gathright, 419 U.S. 59, 95 S.Ct. 254, 42 L.Ed.2d 226 (1974) 11

Galtieri v. Wainwright, 582 F.2d 348, *en banc* (5th Cir. 1978) 10

Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976)..... 10

Hanvy v. State, 215 Tenn. 322, 385 S.W.2d 752 (1965).. 17

Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969) 11

Hockenbury v. Sowders, 620 F.2d 111 (6th Cir. 1980) .. 13

Manning v. State, 195 Tenn. 94, 257 S.W.2d 6,45 A.L.R.2d 299 (1953) 13

Miller v. Hall, 536 F.2d 967 (1st Cir. 1976)..... 11

Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1972) 11

State *ex rel.* Levy v. McMann, 394 F.2d 402 (2d Cir. 1968) 11

Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed. 2d 1067 (1976) 12

Triplett v. Wyrick, 549 F.2d 57 (8th Cir. 1977) 11

United States *ex rel.* Boyance v. Myers, 372 F.2d 111 (3d Cir. 1967)..... 11

United States *ex rel.* McNair v. New Jersey, 492 F.2d 1307 (3d Cir. 1974) 15

United States *ex rel.* Mitchell v. Follette, 358 F.2d 922 (2d Cir. 1966)..... 15

Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) 13

Watson v. Patterson, 358 F.2d 297 (10th Cir. 1966) 11

Willette v. State of Georgia, 608 F.2d 538 (5th Cir. 1979) 15

Statutes Cited

Tenn. Code Ann.

§40-3802 3

§40-3805 3

28 U.S.C. 1254(1) 2,9

28 U.S.C. 2254 2,3,4,10

28 U.S.C. 2254(b) 10

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE,
Petitioner,

v.

NOAH H. LUNDY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Tennessee, on behalf of Jim Rose, Warden of the Tennessee State Penitentiary, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The unreported memorandum opinion of the United States Court of Appeals for the Sixth Circuit was rendered on June 27, 1980, and is attached hereto as Appendix A. The unreported memorandum opinion of the United States Court of Appeals for the Sixth Circuit denying a petition for a rehearing and sug-

gestion en banc on September 4, 1980, is attached hereto as Appendix B.

The unreported memorandum opinion of the United States District Court for the Middle District of Tennessee, Nashville Division and order granting Lundy's petition for writ of habeas corpus on March 21, 1979, is attached hereto as Appendix C. The opinion of the Tennessee Court of Criminal Appeals affirming Lundy's state convictions on August 30, 1974, is reported at 521 S.W.2d 591 (Tenn. Crim. App. 1974), and is attached hereto as Appendix D. The order of the Tennessee Supreme Court denying Lundy's petition for writ of certiorari on March 10, 1975, is attached hereto as Appendix E.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the Court of Appeals for the Sixth Circuit was entered on June 27, 1980. The State's petition to rehear and suggestion en banc was denied by order of that Court on September 4, 1980. This petition is timely filed within ninety (90) days of that date. Jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state ... shall ... deprive any person of life, liberty, or property, without due process of law ...

3. 28 U.S.C. 2254 provides in pertinent part:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented.

4. The provisions of Tennessee Code Annotated, section 40-3802 provide in pertinent part:

A prisoner in custody under sentence of a court of this state may petition for post-conviction relief under this chapter at any time after he has exhausted his appellate remedies....

5. The provisions of Tennessee Code Annotated, section 40-3805 provide in pertinent part:

Relief under this chapter shall be granted when the conviction or sentence is void or voidable because of the abridgement in any way or any right guaranteed by the constitution of this state or the constitution of the United States...

STATEMENT OF THE CASE[2]

Noah Lundy was convicted by a jury, contrary to his pleas, of rape and crime against nature and was sentenced to terms of one hundred and twenty (120) years and fifteen (15) years, respec-

---

[2] References contained within this statement are to pages of the Appendix filed in the United States Court of Appeals for the Sixth Circuit. The Appendix contains portions of the state trial transcript, but the entire state trial transcript was not before the federal courts below.

tively, in the Tennessee State Penitentiary. (A. 107).[3] Lundy's convictions were affirmed by the Tennessee Court of Criminal Appeals on August 30, 1974, and the Tennessee Supreme Court denied review on March 10, 1975. (A. 106-115, 131). Noah Lundy then petitioned the Knox County Criminal Court, Tennessee, for a writ of habeas corpus which was denied, after an evidentiary hearing, on May 3, 1976. (A. 154).

Lundy then petitioned the United States District Court for the Middle District of Tennessee, Nashville Division, for a writ of habeas corpus under the provisions of 28 U.S.C. 2254 and alleged four grounds for relief:

> (1) that he was denied his right of confrontation during cross-examination of the prosecutrix;
>
> (2) that he was denied his right to a fair trial because of a prejudicial remark made by the prosecuting attorney to the jury to the effect that Lundy had a violent character;
>
> (3) that he was deprived of his right to a fair trial when the prosecuting attorney commented, during closing arguments, that the only proof before the jury was from the state's witnesses and was uncontradicted and rebutted; and,
>
> (4) that the trial judge improperly instructed the jury that every witness is presumed to swear the truth. (A. 155-164).

The district court granted habeas corpus relief to Noah Lundy on March 21, 1979 which decision was affirmed by the United States Court of Appeals for the Sixth Circuit. (A. 177-184).

---

[3] A narrative of the facts of the crimes is set forth in the opinion of the Tennessee Court of Criminal Appeals attached herewith, as Appendix D, p. A-14).

At Lundy's trial the rape victim, Sharon Murphy, was cross-examined before the jury as follows, which is the subject of Lundy's first claim for habeas corpus relief:

Q. So you had had intercourse with boys during 1973, is that true or not true?

A. Just Aaron Miller.

Q. And you had intercourse with Danny Nipper, a boy by the name of Danny Nipper, had you not?

A. Not in the year '73. That was the year before in '72.

Q. I believe you had intercourse with Aaron Miller ten to twenty times during this period, had you not?

A. I don't remember how many times.

Q. *That's what you told me previously*

A. *I don't remember.*

* * *

Q. Miss Murphy, *did you or did you not tell me on an occasion when I talked with you that you had had intercourse, with Aaron Miller ten to twenty times?*

A. *I don't remember.* (A. 3-4) [emphasis added].

An objection was made to this line of examination by the prosecuting attorney which was sustained by the trial court, following a jury-out hearing, upon the erroneous ground that the prior statements allegedly made by the witness to the defense counsel were made prior to the defense counsel's identification of himself to the witness as representing the defendant in the case. (A. 13). On direct appeal, the Tennessee Court of Criminal Appeals held that such reasoning was erroneous but harmless in light of the offer of proof subsequently made at a jury-out hearing where the counsel did have an opportunity to question the rape victim concerning her prior statements to the defense counsel. The offer of proof was as follows:

A. Did you or did you not tell me when I spoke with you that you had had intercourse with one Aaron Miller ten to twenty times. . . .

A. *I don't remember if I said exactly that.*

Q. Did you tell me you had had intercourse with one Danny Nipper four times?

A. I remember telling you I had had intercourse with him, *but I don't remember how many times I had told you.* (A. 33) [emphasis added].

The district court held that this amounted to a denial of confrontation in violation of the Sixth Amendment.

In support of a proffer of evidence the prosecuting attorney made the following remarks before the jury, which is the subject of Lundy's second claim for relief:

Q. How long did he [defendant] date your sister?

MR. WORKMAN [defense counsel]: Well, your Honor, I really don't understand the materiality of all this.

GENERAL EVANS [prosecuting attorney]: Well, if you just give him time, I'm sure he'll figure it out.

THE COURT: Well . . ..

GENERAL EVANS: Your Honor, if he wants me to explain it to him in front of the jury, I'll be glad to.

MR. WORKMAN: Your Honor, I don't know where he's trying to lead, but maybe we ought to let the jury step out and find out. I honestly do not know what he's trying to get to.

THE COURT: Very well, gentlemen. I sustain the objection on the basis that it is leading. You may take your time and develop your case, General

Q. Tell the jury whether or not you ever witnessed any difficulties between your sister, while she was dating the defendant, and the defendant?

MR. WORKMAN: Your Honor, I still don't see the materiality of this as to . . .

GENERAL GILL: *I would think the defendant's violent nature would be material to this case in light of what the victim had testified to.*

MR. WORKMAN: Your Honor . . .

GENERAL GILL: I assume they claim that he's not this kind of a person, and we're trying to show that he is. That's materiality.

MR. WORKMAN: Your Honor, if I may finish my statement, I don't see any materiality to this case. He's charged in this case with rape and crime against nature.

GENERAL EVANS: Are you finished now? I will explain, Your Honor. This young lady explained in detail that one of the reasons that she reacted the way she did was because of this advice she received from this young lady. I think it's proper to show why this young lady was given the advice she was. (A. 19-20) [emphasis added].

After the foregoing colloquy, the trial court ordered the jury to be excused from the courtroom during the jury-out proceedings to determine the admissibility of such line of examination. (A. 21).

During closing arguments the prosecuting attorney, in rebutting the defense counsel's summation, made the following remarks which are the subject of Lundy's third claim for habeas corpus relief:

> Now, evidently, the defendant's theory of this case is that we are to believe the minor inconsistencies in the State's proof, and, of course, the State's proof is what we are considering. *The only story we've heard about* what happened from about 8:15 of the night of March 16th until about 4:00 in the morning of March 17th *came from the State's witnesses.* And we're suppose [sic] to think it's important whether or not he was asleep when we got there, whether he was covered or not covered, when the clothes were taken off, whether she was or was not held on the bed, whether or not she was forced with his hands or just suggested that she drink whiskey, and whether or not at one time at one point she had her hands somewhere on his back. (A. 38-39) [emphasis added].

The district court held that the two foregoing statements deprived Lundy of a fair trial in violation of the Fourth Amendment.

The trial judge instructed the jury as follows which instruction is the subject of Lundy's fourth claim for habeas corpus relief:

> The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, for *every witness is presumed to swear the truth.* (A. 44) [emphasis added].

The district court found that grounds 1 and 2 of Lundy's petition had been fairly presented to the Tennessee Supreme Court but that Lundy had not exhausted his available state remedies with respect to grounds 3 and 4 of his petition. (*See* Appendix C, attached herewith, p. A-6). The district court granted habeas corpus relief to Lundy on March 21, 1979 and ordered the State of Tennessee to re-try Lundy within ninety (90) days or to

release him from custody. (*See* Appendix C, attached herewith, p. A-5). The state appealed to the United States Court of Appeals for the Sixth Circuit which Court affirmed the judgment of the district court on June 27, 1980. The petitioner's petition for rehearing and suggestion en banc was denied on September 4, 1980. This petition has been timely filed within ninety (90) days of the judgment of the United States Court of Appeals for the Sixth Circuit. *See* 28 U.S.C. 1254(1).

REASONS FOR GRANTING THE PETITION

1. This case presents the important question of whether or not district courts should entertain petitions for relief under 28 U.S.C. 2254 which contain "mixed" claims for relief, *i.e.*, exhausted and unexhausted claims for relief. Lundy's petition for habeas corpus relief contained four claims for relief; two of which have been presented to the Tennessee Supreme Court and on two of which Lundy has not exhausted his available state remedies. This question has been resolved differently by three circuit courts of appeals. This question was reserved in a case decided on other grounds by this Court.

The State of Tennessee contends that before considering an unexhausted claim a federal court must engage in a balancing process to determine whether the principles of comity outweigh the necessity for immediate federal resolution of the claim. The district court's non-compliance with the exhaustion requirements of 28 U.S.C. 2254(b) seriously jeopardizes the principles of federal-state comity. The entire petition should be dismissed, particularly where the claims are interrelated, so as to prevent inconsistent results with the state court's subsequent review of the unexhausted claims. In this case, the district court found that the "mixed" claims were interrelated but nonetheless refused to dismiss the petition.[4]

The Fifth and Ninth Circuit Courts of Appeals have held that petitions for relief under 28 U.S.C. 2254 should be dismissed, without prejudice, where the petition contains "mixed" claims for relief. *See Galtieri* v. *Wainwright*, 582 F.2d 348, *en banc* (5th Cir. 1978); *Gonzales* v. *Stone*, 546 F.2d 807 (9th Cir. 1976). A conflict now exists between the circuits as the United States Court of Appeals for the Sixth Circuit specifically rejected the decisions of the Fifth and Ninth Circuits.[5]

---

[4] *See* Appendix C. pp. A-12-13, attached herewith.

[5] *See* Appendix A, p. A-1, attached herewith.

While only three circuits have addressed the issue of whether or not a "mixed" petition should always be dismissed, several circuits have held that a district court may *not* consider petitions containing *interrelated* "mixed" claims.[6]

Additionally, this issue has been presented to this Court in *Francisco* v. *Gathright*, 419 U.S. 59, 95 S.Ct. 257, 42 L.Ed.2d 226 (1974) but was reserved for future resolution as the case was decided on other grounds. *Id.* 419 U.S. at 63-64, 95 S.Ct. at 259-260, 42 L.Ed.2d at 230.

The State contends that the comity principles which underlie the exhaustion doctrine are more fully realized when a federal court is required to dismiss, without prejudice, all petitions for habeas corpus relief which contain exhausted and unexhausted claims for relief. Such a rule would eliminate piecemeal litigation in accordance with the judicial policy against fragmentary appeals, and it would also relieve federal courts from a burden of successive petitions. *See Schneckloth* v. *Bustamonte*, 412 U.S. 218, 274, 93 S.Ct. 2041, 2071, 36 L.Ed.2d 854, 890 (1972) (Powell, J., concurring).

Such a rule would also promote the finality of criminal convictions by requiring the state prisoner to resolve all his claims of the entire case in a single proceeding rather than engage in piecemeal resolution of each individual claim. Permitting a federal court to consider selected exhausted claims in a petition could produce untoward effects if a state prisoner prosecutes the exhausted claims in the state court system while pursuing his unexhausted claims through the federal system.

---

[6] *See Miller* v. *Hall*, 536 F.2d 967, 969 (1st Cir. 1976); *State ex rel. Levy* v. *McMann*, 394 F.2d 402, 405-406 (2d Cir. 1968); *United States ex rel. Boyance* v. *Myers*, 372 F.2d 111, 112-113 (3d Cir. 1967); *Hewett* v. *North Carolina*, 415 F.2d 1316, 1320 (4th Cir. 1969); *Triplett* v. *Wyrick*, 549 F.2d 57, 59 (8th Cir. 1977); *Watson* v. *Patterson*, 358 F.2d 297 (10th Cir. 1966).

Adoption of such a rule would create an incentive for a state prisoner to develop fully *all* his claims in the state courts before travelling to the federal system in quest for vindication of his constitutional rights. Such a rule is compatible with recent decisions of this Court which have limited the scope of habeas corpus relief in the interest of the administration of justice. *See Stone* v. *Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *Francis* v. *Henderson,* 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976).

In the instant case, the district court's need for guidance in this area is best illustrated by its own struggle in addressing the exhaustion doctrine while yet granting habeas corpus relief upon the merits of *all* grounds for relief cited in Lundy's petition. Though the district court stated that it would not consider the unexhausted claims in their "constitutional framework," the lower court based its granting of habeas corpus relief upon errors in the state trial raised by the unexhausted claims. (*See* App. C, pp. A-12-13, attached herewith).

2. The district court improperly granted habeas corpus relief because of remarks by the prosecuting attorney which were neither objected to at trial nor presented to the Tennessee Supreme Court and where no cause or actual prejudice was shown for Lundy's precedural defaults. Lundy alleged in grounds 2 and 3 of his petition that the prosecuting attorney had made two improper remarks at trial: he alluded to Lundy's "violent character" during a proffer of evidence before the jury and he improperly alluded to Lundy's failure to testify during the state's rebuttal argument in its summation to the jury. (A. 155-164). The district court found that ground 3 had *not* been exhausted but nevertheless proceeded to expand the claims of alleged prosecutorial misconduct to include *seventeen* additional remarks made by one of the prosecuting attorneys. The district court ignored the state's contentions in its answer that consideration of the alleged additional acts of prosecutorial misconduct were barred from review due to the state procedural

defaults by Lundy in failing to make contemporaneous objections. *See Wainwright* v. *Sykes,* 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594, 610 (1977)[7]

Significantly, Lundy raised only two specific instances of prosecutorial misconduct in the state courts. (A. 46-105, 116-130). The district court ignored Tennessee's procedural rules and evidently held that such alleged prosecutorial misconduct constituted plain error. (*See* App. C, p. A-12, attached herewith). Such finding was made in spite of the fact that some remarks were made *out of the presence of the jury.* The State of Tennessee argued before the Court of Appeals for the Sixth Circuit that the district court's application of the federal plain error rule was erroneous and that Tennessee's plain error rule should have been applied. Such an analysis would have precluded federal review of the additional instances of alleged prosecutorial misconduct. The Court of Appeals rejected this argument and the reasoning of a different panel of that court. *See Hockenbury* v. *Sowders,* 620 F.2d 111, 114 (6th Cir. 1980).

Even assuming that the district court properly expanded Lundy's petition, *sua sponte,* to include the additional instances of alleged misconduct, the State contends that the district court improperly granted relief on this ground as the statements did not amount to egregious error. *See, Donnelly* v. *DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

3. Even if the partial record supports Lundy's claim for habeas corpus relief the Court of Appeals should have remanded the cause for a full and fair evidentiary hearing so that the *en-*

---

[7]Tennessee has long operated under a procedural rule requiring contemporaneous objections to remarks and arguments by a prosecutor in order to seek appellate review of the prosecutor's alleged misconduct. *Edwards* v. *State,* 540 S.W.2d 641 (Tenn.,1976), *cert. den.,* 429 U.S. 1061, 97 S.Ct. 784, 50 L.Ed.2d 777; *Manning* v. *State,* 195 Tenn. 94, 257 S.W.2d 6, 45 A.L.R.2d 299 (1953).

tire state trial transcript could have been reviewed by the district court. The district court granted habeas corpus relief to Lundy nine days after the State of Tennessee filed its answer to the petition. With its answer the State filed only those portions of the voluminous state trial transcript which had been cited in Lundy's petition pertinent to the *specific* claims for relief. The district court granted habeas corpus relief, *inter alia,* on the ground that Lundy was deprived of his right to due process of law because of prosecutorial misconduct. However, the district court did not review the *entire* state trial transcript as required by this Court in *Donnelly* v. *DeChristoforo,* 416 U.S. 637, 642, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431, 436 (1974).

Although the State of Tennessee did not move for reconsideration in order to offer the entire state trial transcript, the state did request such a relief before the Court of Appeals, which was denied.* Althouth no requests for an evidentiary hearing were made in the district court, such failure does not operate as a waiver of the right to insist upon a full and fair evidentiary hearing on behalf of the state.

> Respondent's failure to assert the need for an evidentiary hearing in his motion to dismiss did not necessarily deprive him of the right to assert the absence of a hearing . . . as error on appeal . . .. *Browder* v. *Director, Department of Corrections of Illinois,* 434 U.S. 257, 266, 98 S.Ct. 556, 562, 54 L.Ed.2d 521, 532-533 (1978).

---

*The request was made by the State in a supplemental citation of authorities, during oral argument and in its petition for rehearing and suggestions *en banc.* In conjunction with the request for remand the State moved for permission to file the entire state trial transcript with the Court of Appeals in support only of its request for a remand. The motion was twice denied.

This rule is in accord with the rule followed in several other circuits.[9]

The State of Tennessee contends that the district court in the instant case should not have been so hasty in overturning two state convictions which passed the close scrutiny of four state court proceedings.

The resulting injustice caused by the refusal to grant the state a full evidentiary hearing is illustrated by the rationale of the district court in granting the writ. The district court held that what aggravated Lundy's Sixth Amendment claim was that the state's evidence rested solely upon the credibility of the rape victim. However, if the district court had only reviewed the entire state trial transcript, it would have realized that the rape victim's testimony was corroborated in all respects by the defendant's female companion, Terri Tankersly, who was an eyewitness to the crimes. (*See* App. D, p. A-16-17, attached herewith). Not only did the State fully corroborate the rape victim's testimony with the testimony of Tankersly, but the State also introduced Lundy's confession.

The district court knew that the state trial transcript contained this important evidence because it reviewed the decision of the Tennessee Court of Criminal Appeals, which substantially

---

[9]*Aston* v. *Warden, Powhatan Correctional Center,* 574 F.2d 1169, 1171-1172 (4th Cir. 1978) (failure to request evidentiary hearing at trial level does not operate as a waiver of issue on appeal); *United States ex rel. Mitchell* v. *Follette,* 358 F.2d 922, 929 (2d Cir. 1966) (state's failure to request evidentiary hearing does not entitle district court to grant relief where hearing is otherwise appropriate); *United States ex rel. McNair* v. *New Jersey,* 492 F.2d 1307, 1309 (3d Cir. 1974) (state's failure to request evidentiary hearing does not operate as a waiver of error on appeal); *Willette* v. *State of Georgia,* 608 F.2d 538, 541 (5th Cir. 1979) (grant of habeas corpus relief is reversed and case remanded to permit the state to offer complete state trial transcript concerning plea acceptance hearings).

relied upon the confession and Tankersly's testimony to affirm Lundy's convictions. The federal courts' haste in granting the writ and in failing to grant the State a full evidentiary hearing has turned away the entire state transcript which, if examined, would reflect that the rape victim's testimony was amply corroborated by the testimony of a witness to the criminal episode and by the defendant's own confession. (*See* App. D, pp. A-16-19, attached herewith). Further, review of the entire record would conclusively demonstrate that any prosecutorial misconduct did not deprive Lundy of liberty without due process of law.

> [H]ere the claim is only that a prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process. We do not believe that *examination of the entire proceedings* in this case supports that contention. *Id.*, 416 U.S. at 643, 94 S.Ct. at 1871, 40 L.Ed.2d at 436-437 [emphasis added].

4. The Court of Appeals misread the state trial transcript in concluding that the defendant was deprived of his Sixth Amendment right of confrontation. At his state trial, Lundy sought to cross-examine the rape victim concerning the substance of an interview with Lundy's defense counsel which occurred prior to trial. Although the rape victim had admitted previous acts of unchastity, Lundy's counsel sought to impeach her by implying that she had admitted additional unchaste acts during the pretrial interview. (A. 4). The trial court precluded Lundy's counsel from further examination on this issue after the rape victim denied making the statements. (A. 4). The state trial court erroneously reasoned that because the defense counsel did not identify himself as being the defendant's attorney, the interview was not a proper subject of cross-examination. (A. 13). The state trial judge did, however, permit the respondent's trial counsel to fully examine the rape victim concerning her prior sexual conduct and to rebut her testimony on the subject. (A. 3-4).

Later during the trial, the state trial judge permitted Lundy's counsel to examine the rape victim during a jury-out hearing in order to make an offer of proof. (A. 30-33). Significantly, the rape victim *denied* making the alleged prior contradictory statements. (A. 33-34). Thus, Lundy was unable to lay a proper foundation for impeachment through the rape victim's own testimony as the subject of the examination dealt with a collateral issue.

The Tennessee Court of Criminal Appelas held that the state trial judge's erroneous reasoning for limiting the cross-examination was harmless, under the circumstances of the case and in light of the offer of proof.

> We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that defendant was prejudiced by what we deemed to have been too restrictive a ruling. *See* App. D, p. A-22, attached herewith.

The district court's reliance upon *Davis* v. *Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), was clearly misplaced as the rape victim in the instant case readily admitted her prior sexual conduct. Lundy's Sixth Amendment claim is nothing more than an argument that the jury was entitled to hear an irrelevant cross-examination offered solely for the purpose of laying, in vain, a foundation for subsequent impeachment evidence.[10]

---

[10]Tennessee law states that the cross-examiner is bound by the witness' denial of the prior contradictory statement when the statement pertains to a collateral issue. *Hanvy* v. *State,* 215 Tenn. 322, 385 S.W.2d 752 (1965).

The decisions of the federal courts are the product of serious misreadings of the state trial transcript. Both courts ignored the fact that Lundy failed to lay a proper foundation for the alleged prior statements during the jury-out hearing. Under state law the trial judge's ruling was correct because of Lundy's failure to lay a proper foundation during the offer of proof. There was no denial of Lundy's right of confrontation as the federal courts so held.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM M. LEECH, JR.
ATTORNEY GENERAL

JOHN C. ZIMMERMANN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

APPENDIX

APPENDIX CONTENTS

A. Memorandum Opinion of the United States Court of Appeals for the Sixth Circuit, June 27, 1980 ..... A-2

B. Memorandum Opinion of the United States Court of Appeals for the Sixth Circuit, September 4, 1980..... A-4

C. Memorandum Opinion and Order of the United States District Court, Middle District, Tennessee, March 21, 1979 ..... A-5

D. Opinion of the Tennessee Court of Criminal Appeals, August 30, 1974 ..... A-14

E. Opinion of the Tennessee Supreme Court, March 10, 1975..... A-24

APPENDIX A

79-1280

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Noah Harrison Lundy,
Petitioner-Appellee

v.

James Rose, Warden, and the
Attorney General of Tennessee,
Respondents-Appellants

Order
(Filed June 27, 1980)

Before: CELEBREZZE, ENGEL and MARTIN, Circuit Judges

The respondent appeals from a judgment of the district court granting a writ of habeas corpus discharging Noah Harrison Lundy from custody unless he is retried within ninety days on state charges of rape and crime against nature.

While Lundy's petition stated four grounds for relief, the district judge ruled only on the first two: (1) that Lundy's attorney was prejudicially limited in his cross-examination of the prosecutrix in violation of the petitioner's right of confrontation; and (2) that the prosecuting attorney had violated Lundy's right to due process under the Fourteenth Amendment by improper argument and comment in the presence of the jury. The district judge held that Lundy had not exhausted his state remedies on the remaining claims that the prosecutor had impermissibly commented upon the defendant's failure to testify and that the trial court improperly instructed the jury.

The state in its brief asks this circuit to adopt what it characterizes as a rule in two other circuits requiring district courts to dismiss all petitions for writs of habeas corpus where the petitions assert claims which the petitioner has not exhausted in the state court system. *See Galertieri* v. *Wainwright,* 582 F.2d 348 (5th Cir. 1978) and *Gonzales* v. *Stone,* 546 F.2d 807 (9th Cir. 1976).

Such a rule has not found favor in the Sixth Circuit and this court declines to adopt it in the present case.

With respect to the first and second grounds for relief, the court, upon consideration of the entire record, concludes that District Judge L. Clure Morton, in an opinion dated March 21, 1979, properly found, after examining the state court proceedings, that petitioner's constitutional rights had been seriously impaired by the improper limitation of his counsel's cross-examination of the prosecutrix and by the prosecutorial misconduct. The state's argument that any constitutional errors are insulated from review by habeas corpus by the cause and prejudice rule of *Wainwright* v. *Sykes,* 433 U.S. 72 (1977), is without merit, it appearing that in all events the state courts of Tennessee did not apply any Tennessee state contemporaneous objection rule with respect to such claims, but had proceeded to consider the same on the merits. Accordingly,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX B

79-1280

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Noah H. Lundy,
Petitioner-Appellee

v.

Jim Rose, Warden, Tennessee
State Penitentiary,
Respondent-Appellant

Order
(Filed September 4, 1980)

Before: CELEBREZZE, ENGEL, and MARTIN, Circuit Judges

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the respondent-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 79-3081-NA-CV

Noah Harrison Lundy

v.

Vinson Thompson, Warden,
Tennessee State Penitentiary
and the Attorney General for
the State of Tennessee

Order

(Filed March 21, 1979)

In accordance with the Memorandum contemporaneously filed, a Writ of Habeas Corpus shall be granted and the defendant discharged from custody unless within ninety (90) days the State of Tennessee initiates steps to try defendant anew.

/s/ L. Clure Morton

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 79-3081-NA-CV

Noah Harrison Lundy

v.

Vinson Thonpson, Warden,
Tennessee State Penitentiary
and the Attorney General for
The State of Tennessee

Memorandum

(Filed March 21, 1979)

Petitioner Noah Harrison Lundy seeks relief pursuant to 28 U.S.C. § 2254 from a judgment of conviction of rape and crime against nature. He has asserted four grounds for relief:

1. Limiting the cross examination of a witness (prosecutrix).

2. The prejudicial conduct of prosecuting attorney in making certain remarks in front of the jury.

3. That the prosecuting attorney commented on the failure of the defendant to testify.

4. The trial court gave an improper charge to the jury that every witness is presumed to swear the truth.

The petitioner asserts that grounds three and four have not been previously presented to any court, state or federal. The records of the state cause reflect that grounds one and two were presented to the highest court in Tennessee having jurisdiction and decided adversely to petitioner. The records further reveal that grounds three and four were not so presented.

Since grounds three and four have not been presented to the state court there has been no exhaustion of remedies as to these two. Thus this court will not consider them in the constitutional framework. However, in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally.

Prosecutorial misconduct and the deprivation of a meaningful cross examination of one of two eye-witnesses (the prosecutrix) was squarely presented in the court proceedings. The Court of Criminal Appeals of Tennessee responded in the following language:

> Error is assigned upon the trial court's ruling that defense counsel could not cross-examine the victim by asking her about specific statements that she supposedly made to defense counsel in a pre-trial interview in defense counsel's office. The predicate for this ruling was the fact that defense counsel did not tell the witness that he was counsel for the defendant, but only that he was a lawyer in the case. The final assignment of error is related to this one, in that it accuses State's counsel of making prejudicial remarks about defense counsel during argument before the jury about the admissibility of these questions.
>
> We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming case before questioning a witness. He apparently made no misrepresentation, and was apparently seeking the truth. State's counsel was unduly critical of defense counsel in indicating before the jury that State's counsel should have been present at the interview, etc., but we hold this error to be harmless in the context of this case.

To properly address the two grounds asserted by petitioner it is necessary to refer to a substantial amount of testimony. Thus pages 42 through 55 and pages 88 and 113 of the evidence, the argument of the Attorney General to the jury, pages 262 through 268, and the charge of the court on page 291 are made an appendix to this memorandum.

An analysis of the testimony reflects improper conduct of the Attorney General as follows:

(1) On pages 43 and 44 the state's attorney represented to the jury that defense counsel was guilty of illegal and unethical conduct on interviewing the prosecutrix when he knew or should have known that his representation was false.

(2) On page 44 the state's attorney testified to the jury that the prosecutrix was telling the truth. Clearly, this was reprehensible conduct in that the attorney placed his own reputation and the power of the state as vouching for the truthfulness of the testimony of this witness. Neither the attorney nor the State of Tennessee were subject to cross examination. The statement in evidence by General Evans was, "She's telling the truth on the stand . . . ."

(3) The Attorney General stated in the presence of the jury his idea of the proper method for a defense counsel to interview witnesses.

(4) The Attorney General clearly misrepresented the law to the court in connection with the interviewing of the government's witnesses.

(5) The Attorney General represented to the court that the prosecutrix and victim of an alleged criminal event has the right to be represented by counsel and for an attorney general of the State of Tennessee to be present when the witness is interviewed by defense counsel. This is, of course, ridiculous.

(6) The Attorney General represented to the court that because defense counsel interviewed the prosecutrix without an attorney or the state's attorney present, the conduct of defense counsel was inexcusable. This is less than the conduct required of an attorney general charged with the equal treatment of all citizens.

(7) The Attorney General denied an intention to file a grievance with the "Bar Association" because of the aforementioned alleged unethical conduct. The implication that such a grievance would be valid constitutes an effort to browbeat defendant's counsel.

(8) Through the objections of the Attorney General, which had no legal basis, the court was induced to deprive defendant of the right to effectively cross examine the victim, possibly the most important witness against defendant. The objection and ruling were that the witness could not be examined as to previously conflicting statements prefaced by, "Did not you tell me on [a prior] occasion . . . ." As stated by the appellate court in this cause, the ruling was erroneous. An attorney for the State of Tennessee represents that he has sufficient knowledge to properly prosecute cases without infringing the Sixth Amendment rights of defendants. If this prosecutor had such knowledge, it was not evidenced in this cause.

(9) The Attorney General stated in the presence of the jury, "I would think the defendant's violent nature would be material in this case . . . ." Once again the prosecuting attorney placed his personal testimony before the jury. By this statement he indicated to the jury that the State of Tennessee vouched for such a fact.

(10) In the final summation by the Attorney General he used the word "I" innumerable times. He continuously testified and added his personal evaluations to the State's proof. Some examples are:

(a) I cannot imagine in my own mind a worse crime being committed, a more personally humiliating crime being committed.

(b) I can't think of a more grave or upsetting crime than the ones we've[ves] [sic] heard here for the last two days.

(c) The only story we've heard about what happened from 8:15 on the night of March 16th until about 4:00 in the morning of March 17th *came from the State's witnesses.* (Emphasis supplied)

(d) I don't think it's important, but . . . .

(e) Now, *I, like General Gill, could not believe the words* I was hearing back when we started this case . . . . (emphasis supplied)

(f) Well, I think it's pretty important to her.

(g) I don't think she'll ever forget what she went through that night out there.

(h) . . . and the first question I asked that lady when I talked to her was why she got in the car, and she thought they were in the neighborhood, and it was raining, and she wanted to get a ride home. She's about as lazy as I am, I guess.

The very minimum interpretation of this statement to the jury is that the Attorney General was testifying to a conversation which occurred in his first interview with the prosecutrix in his office. In addition he was giving testimony as to the reason for the action of the prosecutrix in entering the defendant's car, i.e., laziness.

(i) On the other hand, *if you think as I do,* and I've never wanted to be on a jury more in a case *I've tried,* that this is one of the most despicable crime *I have ever heard* testimony presented in six years of being in prosecution . . . . (emphasis supplied)

> . . . and I don't mean ten years, and I don't mean twenty years, and I don't even mean ninety-nine years. I mean forever. If you agree with me that it is despicable as I feel it is, I want you to set a term that . . . .

In addition to the lack of opportunity to cross-examine, the foregoing testimony of the Attorney General was prejudicial in that he made a factual comparison of testimony in similar cases based on his personal experience as a representative of the great State of Tennessee.

> (j) I don't think there's anything unreasonable about a term of years that will make sure he spends the rest of his life in the penitentiary, and that's a term way over the standard fifty or sixty or seventy years for rape.

In addition to advising the jury of his personal opinion (not subject to cross-examination and a direct violation of ethical standards), the Attorney General represented that there was a standard term of incarceration on conviction for rape of from fifty to seventy years. Any first-year law student would recognize this statement as being a deliberate falsehood. Even though the court instructed the jury there was no standard, the prosecuting attorney had placed before the jury the thought that some kind of measuring stick did in fact exist.

The above related items were followed by the charge of the court which contained the following:

> The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, *for every witness is presumed to swear the truth.*" (emphasis supplied)

Without determining the legality of the above charge (*See generally,* Cupp v. Naughten, 414 U.S. 141 (1973)), since this question has not been presented to the courts of the State of Tennessee, and assuming as we must that the jurors followed the law as given by the court, the jurors were instructed that they must presume that the testimony given by the victim was true. The jury had no opportunity to determine whether the witness had made a conflicting statement to the defense attorney prior to trial. This when coupled with the personal testimony of the Attorney General, both during the presentation of the State's case and during argument, constitutes a clear violation of defendant's right to a fair trial. Also, subject to the question of exhaustion of state remedies, where there is added to the trial atmosphere the comment of the Attorney General that the only story presented to the jury was by the state's witnesses there is such mixture of violations that one cannot be separated from and considered independently of the others.

Aside from addressing the illegal restriction on defense counsel of the cross examination of a key state witness, the state court addressed the remaining issues in the following language: "We have carefully examined all assignments of error. We affirm the convictions."

This court is aware that there is sufficient evidence, if believed by the jury, to sustain the conviction of the petitioner for this terrible crime. However, that evidence is overwhelming only if the testimony of the prosecutrix (victim) is likewise believed. Under the charge as given, the limitation of cross examination of the victim, and the flagrant prosecutorial misconduct this court is compelled to find that petitioner did not receive a fair trial, his Sixth Amendment rights were violated and the jury poisoned by the prosecutorial misconduct.

See Davis v. *Alaska,* 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed. 2d 347 (1974). *Cf. Donnelly* v. *De Christoforo,* 416 U.S. 637, 644, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). (Prosecutorial im-

propriety did not amount to denial of fair trial where trial judge "took special pains" to correct any misimpression of jury.) *See generally, United States ex rel. Fournier* v. *Pinto,* 408 F.2d 539 (3rd Cir. 1969).

The Writ shall be granted and the defendant discharged from custody unless within ninety (90) days the State of Tennessee initiates steps to grant defendant a new trial.

/s/ L. CLURE MORTON
CHIEF JUDGE

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE
KNOXVILLE, APRIL, 1974

No. 283, Knox County
Hon. Richard R. Ford, Judge
(Rape and Crime Against Nature)

Noah Lundy,
Plaintiff-in-Error

v.

State of Tennessee,
Defendant-in-Error

For the Plaintiff-in-Error

Dale C. Workman and
Geoffrey D. Kressin
Knoxville, Tennessee

For the Defendant-in-Error

David M. Pack
Attorney General

Bart Durham
Assistant Attorney General

Lance D. Evans and
John W. Gill, Jr.
Assistant District Attorneys
General

Opinion Filed: August 30, 1974

AFFIRMED

WILLIAM S. RUSSELL,
Judge

Opinion
(Filed August 30, 1974)

The plaintiff-in-error, Noah Lundy, indigent and represented by appointed counsel, appeals his convictions for rape and a crime against nature and consecutive penitentiary sentences of one hundred twenty (120) and five (5) to fifteen (15) years.

The alleged rape victim, Sharon Murphy, was enticed into Lundy's automobile by Lundy's fourteen-year-old female companion, Terri Tankersly, at his direction, on the pretext of giving the victim a ride home. Miss Murphy had walked alone to a neighborhood market to purchase soft drinks shortly after 8 p.m. It had begun to rain. She entered the car in response to an offer of a ride in the belief that the couple lived in the neighborhood. Lundy did drive her past the apartment where she was living, but refused to stop the car. The victim testified that after passing her home Lundy restrained her by grabbing her arm, subsequently ordered her to change places with the other girl by moving to the center seat position, and as they continued to drive ordered her to remove all of her clothing. The victim asked Terri Tankersly if she had to, and was given an affirmative answer. Lundy told the victim that he would knock her brains out if she didn't undress. Scared and crying, Miss Murphy completely disrobed. Lundy put his hand between her legs, she slapped it and he removed it. At Lundy's direction Terri Tankersly blindfolded the victim with Miss Murphy's bra.

When the three arrived at Lundy's apartment the victim was allowed to put back on her shorts and a jacket and was led inside. Terri Tankersly brought the balance of her clothing. Once inside the apartment Lundy ordered her to completely disrobe again, and to get upon the bed. Her blindfold was removed at her request. He also undressed. The victim asked for a drink of water, which the other girl got for her. Lundy made her drink some whiskey from a bottle from which he was imbibing. He then ordered Miss Murphy to lie on the bed. She testified that he took her hands and held them up over her head as he commenced intercourse.

Miss Murphy at no time fought, screamed, ran or in any way resisted the intercourse. No weapon was ever used or displayed by Lundy. Miss Murphy was concerned that they would hurt, or kill her; and begged them not to. It seems fair to say that the victim was more apprehensive about possibly being hurt or killed than she was about being sexually violated, as she was passively submissive. It cannot be denied, however, that she was totally within the power of the captors, and her obedience to submission orders must be weighed in that context.

After the first act of intercourse, which apparently did not result in a sexual climax for Lundy, he ordered Terri Tankersly to put a cloth on the kitchen table. He then ordered the victim to go to the kitchen and lie upon her back upon the table, with her head hanging over the edge. He threatened to knock her brains out if she didn't comply. When thus positioned, he ordered Miss Murphy to open her mouth, and "he stuck his penis down my throat". She gagged and pushed him away, at which time he viciously struck her with his fist upon the cheek, the mouth and the forehead. The victim commenced crying again. He made her lie back down again, and inserted his penis down her throat and moved it in and out, and she started to vomit and pushed him away again. He struck her with his fist upon the abdomen and upon the right side. She got off the table, crying, and asked for a drink of water. His response was to make her get down on her knees and he urinated in her mouth, making her swallow most of the urine.

Lundy then ordered the victim back into the bed, already occupied by the disrobed Terri Tankersly. He first ordered Miss Murphy to insert her finger into the other girl's vagina and manipulate it, despite Terri Tankersly's begging him not to. After this was done he ordered Miss Murphy to suck the other girl's vagina. When compliance did not suit Lundy, he struck Miss Murphy twice upon the back of her head with his fist. She then performed the cunnilingus for about two minutes before becoming sick. He then allowed her to stop. Terri Tankersly

testified that while Miss Murphy was performing cunnilingus upon her that Lundy was "trying to have relationship with her in her rear end".

Finally, Lundy had normal intercourse with the victim again, for more than thirty minutes, without ever reaching a climax. He discussed tying Miss Murphy to the bed and keeping her for two or three days, and even had the other girl to tie some socks together to use for bindings. However, at the victim's suggestion, he went to sleep. Significantly, Terri Tankersly, the fourteen year old companion of Lundy and with whom he had admittedly been having sexual intercourse for years, fled the apartment as soon as Lundy was asleep. She tried to get Miss Murphy to go with her, expressing the fear that he was going to kill both of them; but the victim was afraid to leave at that time for fear of awakening Lundy, who had an arm and leg across her. Some two hours later when he turned over, she fled the premises, hailed a passing taxi, and immediately reported having been kidnapped and raped.

All of this obscene detail has been necessary to this opinion because of the serious question raised as to whether the intercourse was forcible rape. No weapon was ever exhibited, and no resistance was offered. Both sides rely upon the case of *King* v. *State,* 210 Tenn.150, 357 S.W.2d 42 (1962). Unquestionably the act to constitute rape must be forcibly done and against the will of the female. Force means power, compulsion or strength directed toward an end. And against her will means against or without her consent express or implied. *Kind* v. *State, supra.* Whether force was used is a jury question. In this case, apparently no significant force was directly employed in conjunction with the acts of normal intercourse. The victim was told to submit and she did. But, in context, it cannot be said that she consented, nor can Lundy seriously contend that she did. At all times she was a captive, in justified fear for her very life. Admittedly having had some prior sexual experience, she chose to submit to avoid injury or even death. Consent obtained by force or

fear due to threats of force is void and the offense rape. *1 Wharton's Criminal Law and Procedure* 649, §311. Her tacit consent by non-resistance has been found by the jury to be no consent under the circumstances. She did not consent to being kidnapped and imprisoned; and it was in that context that she was raped. It would be an unreasonable misapplication of the law to require as a matter of law that a captured female be required to incur a beating before it could be said that demanded intercourse with her was rape. The force and restraints inherent in the situation supply the forcible character to the act. We hold in response to the first two assignments of error, that the convicting evidence on the charge of rape is legally sufficient to support the conviction and that it was not error for the trial judge to refuse to direct a not guilty verdict. A jury question was certainly presented by the proof.

The cunnilingus which Lundy forced the two girls to engage in is the basis for his crime against nature conviction. It is assigned as error that both convictions cannot stand because "there was only one common intent". It is clear under these facts that different evidence is required to establish the two different acts, and that a different and separate intent was reflected. The assignment is overruled. See *Ward* v. *State*, Tenn.Crim.App., 486 S.W.2d 292, *Harris* v. *State*, 206 Tenn.276, 332 S.W.2d 675; and *Rockett* v. *State*, Tenn.Crim.App. 475 S.W.2d 561. Error is assigned upon the trial court's refusal to charge a certain "special request". It was defense counsel's theory that the State could not impeach any of the testimony of Terri Tankersly, whom they had called as a prosecution witness, and a note was passed to the trial judge, in response to his invitation for special requests, asking him to charge the law relative to the State's attesting to the credibility of the witnesses it calls. No specific language was tendered; so, in legal affect, no special request was made. The note said: "Defendant Noah Lundy requests the Court to give its standard and normal charge that one party to the case calling a witness in its behalf makes that person that side's witness and the legal ef-

fect thereof as to the other testimony being binding and the side calling the witness attesting for credibility". The charge as given was correct. If more specificity and enlargement on a given point was desired it was necessary to tender the exact charge requested. The trial judge noted: "Refused. Ambiguous and unclear. The Court's charge was adequate as given". We need not reach the question of substantive law sought to be raised, because the "special request" was not in a proper form to raise it. However, no authority is cited for the theory, if it be plaintiff-in-error's theory, that a criminal court judge must charge the jury that the State vouches for the credibility of each and every one of its witnesses, and is bound by their testimony. The assignment is overruled.

A related assignment complains that the State was permitted to ask questions of Terri Tankersly, their witness, which were of an impeaching nature. We do not find that this happened. On redirect examination she was asked questions which amplified her answers upon cross-examination, as was proper.

Error is assigned upon the admission into evidence of Lundy's written statement to officers, voluntarily given after full warnings. The sense of the assignment seems to be that the statement was not a full confession, so was inadmissible as a confession. It was admissible for whatever probative value that it had upon the issue of guilt, and the assignment is overruled.

The next assignment has to do with the victim's report to officers immediately after her escape. She gave them a detailed account of the events, substantially as she testified to them. One of the officers was permitted to testify as to exactly what she reported by referring to the written statement which he took from her. It is well settled that the report of a rape victim, given within a reasonable time after the fact, is competent evidence. *King* v. *State, supra.* That the report was reduced to writing adds to the accuracy of the officer's testimony, and certainly does not render the otherwise competent evidence incompetent.

The next assignment of error related to the statement of Terri Tankersly, also given to officers shortly after the crime. Complaint is made that this statement was incompetent evidence. We find that this evidence was first gone into on cross-examination and thus made competent. The trial judge committed no error.

Error is assigned because of an attempt by the State to prove that Lundy had physically abused Terri Tankersly's sister years before in a totally unrelated occurence. The trial court properly excluded the evidence and instructed the jury to disregard the question. State's counsel made some remarks in the presence of the jury that were overly zealous in support of this incompetent line of proof, and in a different case could constitute prejudicial error. State's counsel alluded to "the defendant's violent nature" as being a matter of fact; and said that the State was trying to show that he was "that kind of a person". However, in the context of the undisputed facts of this case we hold any error to have been harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S.18, 87 S.Ct.824, 17 L.Ed.2d 705(1967); *Huffman* v. *State,* ____ *Tenn.Crim.App.* ____, 458 S.W.2d 29(1970).

The next assignment of error is that the Court erred in convicting the defendant of a crime against nature on the theory of aiding and abetting. Another related assignment is that the conviction on the charged act of cunnilingus is void and invalid because cunnilingus "is not prohibited as a crime against nature in T.C.A.§39-707".

This Court has recently held, in the context of a case of forcible cunnilingus committed by the defendant upon a victim, that the act was a crime against nature as proscribed by T.C.A.§39-707. *Locke* v. *State,* Tenn.Crim.App., 501 S.W.2d 826(1973). Again, in the case sub judice, you have the element of coercion, this time motivating both of the literal participants. Here, the direct participants were both female. Plaintiff-in-error contends that neither of the females was committing a

crime under the circumstances, and reasons that there was no principal criminal whom Lundy could have been guilty of aiding and abetting.

Lundy was not indicted as an aider and abettor. He was charged: "* * * unlawfully and feloniously did commit a crime against nature in and upon one Sharon K. Murphy; that is to say, that the said Noah Lundy, Alias, did make, force and compel the said Sharon K. Murphy to perform an act of cunnilingus upon the said Terri Tankersly, a female, * * *".

The evidence certainly supports the factual allegations of the indictment. Lundy was not accused of aiding and abetting, but of forcing the commission of the proscribed act. Whether Sharon K. Murphy is called the victim, or Terri Tankersly, or nobody, is really immaterial. Crimes against nature may be victimless, with both parties as accomplices of one another; or they may involve an innocent person forced to participate, or incapable of consenting. In the case sub judice, both of the females were victimized.

The trial judge did charge the law of principal guilt by being present, aiding and abetting, as set out in T.C.A.§39-109, as follows:

> "39-109. Aiders and abettors deemed principal offenders. — All persons present, aiding and abetting, or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders, and punished as such."

We also have a statute which provides for the conviction of an aider and abettor whether the principal offender has been convicted or not. T.C.A.§39-110. That statute does, however, presuppose that a principal exists; while in the instant case Lundy is himself the only principal. By forcing others to do an act which society has proscribed Lundy is himself directly responsible. The force and coercion was his active contribution

to the cunnilingus. While the judge's charge dealt with aiding and abetting, and with conspiracy, and did not directly charge the jury that Lundy would be himself criminally chargeable with acts which he forced others to perform, the charge did say" "If, therefore, you find from the proof beyond a reasonable doubt that this offense has been committed by the defendant in manner and form as charged in the indictment * * * the defendant is guilty of the crime against nature and you should convict him of this offense* * *". In the absence of a special request for further instructions, we do not find reversible error in the charge. While the questions presented by the factual situation in this case are fuel for an academic trip of almost limitless dimensions, and would delight any law professor, we confine ourselves to holding that forced cunnilingus is a crime against nature, and that Lundy was more than an aider and abettor and was convicted under the indictment as the principal offender who forced the criminal act. No other principal is necessary to his conviction.

Error is assigned upon the trial court's ruling that defense counsel could not cross-examine the victim by asking her about specific statements that she supposedly made to defense counsel in a pre-trial interview in defense counsel's office. The predicate for this ruling was the fact that defense counsel did not tell the witness that he was counsel for the defendant, but only that he was a lawyer in the case. The final assignment of error is related to this one, in that it accuses State's counsel of making prejudicial remarks about defense counsel during argument before the jury about the admissibility of these questions.

We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming

case before questioning a witness. He apparently made no misrepresentation, and was apparently seeking the truth. State's counsel was unduly critical of defense counsel in indicating before the jury that State's counsel should have been present at the interview, etc., but we hold this error to be harmless in the context of this case.

We have carefully examined all assignments of error. We affirm the convictions.

/s/ William S. Russell, Judge

CONCUR:

W. Wayne Oliver, Judge

Robert K. Dwyer, Judge

APPENDIX E

In the Supreme Court of Tennessee
at Knoxville

Knox Criminal
Docket No. 283 C.C.A.

Noah Lundy,
Petitioner,

v.

State of Tennessee,
Respondent.

In Re: Petition for Writ of Certiorari of Noah Lundy
(Filed March 10, 1975)

Upon consideration of the petition for certiorari and the entire record in the cause,

We are of the opinion that the Court of Criminal Appeals correctly dealt with the assignments of error in that court and no new issues having been raised on the petition herein, the writ is denied.

PER CURIAM

Office-Supreme Court, U.S.
FILED
MAY 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE, Warden,
Petitioner,

v.

NOAH H. LUNDY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

JOINT APPENDIX

WILLIAM M. LEECH, JR.
ATTORNEY GENERAL
STATE OF TENNESSEE

JOHN C. ZIMMERMANN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3231
Counsel for Petitioner

D. SHANNON SMITH
201 Second National
Building
830 Main Street
Cincinnati, Ohio 45202
(513) 651-4130
Counsel for Respondent

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 10, 1980
CERTIORARI GRANTED FEBRUARY 23, 1981

TABLE OF CONTENTS

Page

Relevant Docket Entries Of The United States Court Of Appeals For The Sixth Circuit And United States District Court For The Middle District Of Tennessee 1

Portions Of State Trial Transcript:

Testimony Of Miss Sharon Murphy (St. Tr. pp. 42-55) 6

Bench Conference (St. Tr. pp. 88-89) 15

Testimony Of Terri Tankersley (St. Tr. pp. 112-122) 16

Testimony Of Miss Sharon Murphy, Jury-Out Hearing (St. Tr. pp. 233-236) 24

State's Rebutal Summation Argument To Jury (St. Tr. pp, 262-268) 26

Portion Of Trial Court's Charge (St. Tr. p. 291) .. 31

Lundy's Brief Filed In Tennessee Court of Criminal Appeals 32

Lundy's Brief Filed In Tennessee Supreme Court 49

Opinion Of Tennessee Court Of Criminal Appeals, Filed August 30, 1974 52

Opinion Of Knox County Criminal Court Denying Lundy's Petition For Post-Conviction Relief, May 3, 1976 62

Lundy's Federal Petition For Relief Under 28 U.S.C. §2254 64

State's Answer To Federal Petition For Writ Of Habeas Corpus 78

Order And Memorandum Opinion Of United States District Court For The Middle District Of Tennessee 87

Per Curiam Opinion Of Sixth Circuit Court Of Appeals 95

No. 80-846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE, Warden,
Petitioner,

v.

NOAH H. LUNDY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

JOINT APPENDIX

RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

GENERAL DOCKET
UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DATE	FILINGS—PROCEEDINGS
1979	
5/24	Certified Record (1 vol. pleadings, 1 envelope pleadings), filed; and cause docketed

7/2	See Order of 3/18
7/13	Brief (7) of appellee (m-7-12) (pro se)
1980	
2/5	Order appointing counsel
2/7	Motion: appellants' to include state trial transcript in appendix (m-2/6)
2/12	Motion: appellee to strike brief and appendix of appellants (m-2/8)
2/12	Appearance of D. Smith for appellee
2/12	Appearance of J. Zimmermann for the appellant
3/18	Order granting the appellee's motion to strike the brief and appendix filed by the appellants; appellants to file new brief and appendix by April 18, 1980; further, order denying appellants' motion to include a state trial transcript in the appendix
3/6	Brief and appendix (7) of appellee (m-3/5)
3/17	Reply brief (8) of appellant
4/16	Appendix (8) of appellant (m-4/15)
4/17	Motion: appellant's brief to 66 pages (Granted 4/21/80 JPH)
4/21	Brief (8) of the appellant (m-4/15)
6/12	Additional citations submitted by appellant (m-6/10)
6/16	Cause argued by J. Zimmerman for the appellant, by D. Smith for the appellee and the case submitted to the Court (Before: Celebrezze, Engel and Martin, JJ.)

6/27	Judgment of the District Court affirmed on order without opinion (Celebrezze, Engel and Martin, JJ.)
7/11	Motion: appellants to file state trial transcript (m-7/9)
7/25	Order denying the appellant's petition to file the trial transcript (Engel, J.)
7/25	Petition for rehearing en banc (m-7/9)
9/04	Order denying petition for rehearing (Celebrezze, Engel and Martin, JJ.)
9/12	Mandate issued (no costs taxed)
11/17	Motion: appellant to recall mandate (m-11/14) (Motion granted-Engel, J.)
12/1	Notice of filing petition for certiorari 11/25/80 (Sup.Ct.No. 80-846)
12/03	Order granting motion of appellant to recall the mandate
12/03	Certified copy of above order issued to District Court
1981	
1/5	Motion: respondent for stay of mandate (m-1/2/81) (Granted, Engel, 1/6)

GENERAL DOCKET
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

DATE	PROCEEDINGS
2/15/79	ENTERED Ordered that Clerk will file attached petition for habeas corpus in forma pauperis and issue process. The State shall show cause within 20 days why a writ of habeas corpus should not issue and shall file a transcript of the proceedings in the trial court. Cy of this Order to USM for service on Vinson Thompson along with summons and cy of petition.
2/15/79	FILED: Petition for habeas corpus under 28 U.S.C. Section 2254. Cy of petition, summons and USM 285, and Order to USM for service.
3/12/79	Filed: Motion for Summary judgment, in behalf of defendant.
3/12/79	Filed: Answer. The respondents respectfully submit that the petition for Writ of Habeas Corpus should be denied and the case dismissed.
3/21/79	Entered: Order in re motion for summary judgment: Denied. Case Notice No. 2.
3/21/79	Entered: Memorandum of the Court . . . Under the charge as given, the limitation of cross examination of the victim, and the flagrant prosecutoial misconduct this court is compelled to find that petitioner did not receive a fair trial. Therefore the writ shall be granted and defendant discharged from custody unless within ninety days the State of Tennessee initiates steps to grant defendant a new trial.

3/21/79 Entered: Order of the court . . . a writ of Habeas Corpus shall be granted and the defendant discharged from custody unless within ninety days the State of Tennessee initiates steps to try defendant anew.

4/12/79 Filed: Notice of Change of Parties. C/S

4/12/79 Filed: Notice of Appeal. C/S

4/17/79 Entered: Order in re motion for Stay pending appeal: Granted. Case Notice NO. 3

RELEVANT PORTIONS OF STATE TRIAL TRANSCRIPT

Testimony Of Miss Sharon Murphy

* * * * * * *

[42]* A Sir?

Q. This is one of the boys the Attorney General referred to that you had had intercourse with previously? A. Yes.

Q. So this wasn't a year before this happened, it was all the way up to two weeks before it happened, is that correct?

Gen. Evans: Your Honor, that makes it within a year before it happened. I was covering two incidents. And I think two weeks before is within the year before, I would assume.

The Court: Very well. The members of the jury will do their own recollection of what the witness testified to previously. Mr. Workman, with respect to the Attorney General's objection, it is good, and I sustain it.

Q. Mr. Workman: I don't understand.

The Court: I sustained to his objection.

Mr. Workman: To my previous question?

The Court: Yes. Your determination of what she had said earlier.

Q. So you had had intercourse with boys during 1973, is that true or not true? A. Just Aaron Miller.

Q. And you had intercourse with Danny Nipper, [43] a boy by the name of Danny Nipper, had you not? A. Not in the year '73. That was the year before in '72.

---

*Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

Q. I believe you had intercourse with Aaron Miller ten to twenty times during this period, had you not? A. I don't remember how many times.

Q. That's what you told me previously. A. I don't remember.

Gen. Evans: Object to what he told her previously.

The Court: Very well. I sustain the objection. You may ask her questions, Mr. Workman, but, ladies and gentlemen of the jury, you will not consider for any purpose the comment of counsel. The duty of counsel is to ask the questions and let the witness answer them. All right.

Q. Miss Murphy, did you or did you not tell me on an occasion when I talked with you that you had had intercourse with Aaron Miller ten to twenty times? A. I don't remember.

Gen. Evans: Your Honor, I want to object to that, because I consider the conversation he had with her—this young lady—completely improper. He didn't inform her who he was....

Mr. Workman: What?

[44] Gen. Evans: ...he didn't inform her who he was, he didn't tell her she had a right to have counsel present, he didn't do anything. He got her down there....

Mr. Workman: (Inaudible)

Gen. Evans: She's telling the truth on the stand—and he got her down there, and now he's trying to make use of that conversation, which was completely improper, and I object to any reference to that conversation or any attempt to use it to impeach on cross-examination.

Mr. Workman: If I may, Your Honor, I don't like the inference that counsel got her down there and tried to twist her arm. As the Court knows, counsel in all cases try to contact the

witnesses and find out what they know, and that's what I did in this case. It happens in 99 percent of the cases in this court.

Gen. Evans: In most cases, Your Honor, that I'm familiar with, I believe the proper thing to do is that counsel inform the people they're talking to the people who they represent, which did not happen in this incident. This young lady did not know who she was talking to at the time she was talking to him.

[45] Mr. Workman: During the course of my talking to her, I got a phone call from another....

The Court: Excuse me, excuse me, gentlemen. Would counsel approach the bench here a moment. THEREUPON, A CONFERENCE WAS HELD AT THE BENCH OUT OF HEARING OF THE JURY. THE JURY WAS EXCUSED FROM THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD:

The Court: Very well. In the absence of the jury here, General, you may state the basis of your objection to the question asked.

Gen. Evans: Your Honor, this has happened in too many cases recently, and it's crucial in this case. This is a nineteen year old girl, and she told me the same thing that Dale was telling you up at the bench. She gets a call from a guy who says I'm a lawyer and I'm involved in the Lundy case. Now, here's a girl that's never been to court before or anything. Her only connection so far with this case was that she went to the grand jury on it. She gets a call from somebody who says I'm Dale Workman, and I'm an attorney, and I'm involved in the Lundy case, and I want to talk to you. She says, well, sure, I'll come down to your office and talk to you. The very same thing she said to me when I called her. Of course, I identified myself.

[46] Mr. Workman: And I did identify myself.

Gen. Evans: I said I was the District Attorney General, and I represent the people of the State of Tennessee. I laid the whole thing out for her. Now, he didn't. He said he was involved in the Lundy case. Well, I'm involved in the Lundy case. Then he gets her down there, and now he wants to impeach her on anything she said at that conference. She was never advised of any rights. And I know what he says. Oh, she doesn't have any rights. Well, I think she does, and I'm sick and tired—I'm going to say this in front of the jury if it gets in—I'm sick and tired of everybody in the United States having rights but the victims in these criminal cases. And she's got just as much right as anybody else. She has a right to be represented by counsel, she has a right for one of us to be there when she's talking to anybody involved in this case, and he knows it.

Mr. Workman: Citation of authority, General.

Gen. Evans: And he should tell her that.

Mr. Workman: Citation of authority, General.

Gen. Evans: She has a right to be represented.

Mr. Workman: Cite the authority for the [47] Court.

Gen. Evans: Well, she's my client. If he can't....

Mr. Workman: (Inaudible)

Gen. Evans: ...I'm sorry if he doesn't understand legal ethics. I'm sorry.

Mr. Workman: Cite what legal ethics, General.

Gen. Evans: Saying that you're not suppose to talk to another lawyer's client without that lawyer being present. Now, if he hasn't seen that in the ethics, then forget it. Now, I'm tired of it happening. And in this case, they're going to try to make a big thing out of it, so I'm raising the roof. Now, if Your Honor decides it is admissible, and they can cross-examine on this, then

we're going to have a whole new collateral issue, because I'm not going to stop with just trying to get her to explain her answers. I'm going to have her explain what happened, and how she wasn't advised of her rights, and how he tape recorded all this without telling her that was going on....

Mr. Workman: Who said I tape recorded her?

Gen. Evans: You told me you tape recorded her.

[48] Mr. Workman: No, I didn't, General. I said (Inaudible).

Gen. Evans: Okay. But that's my objection.

The Court: All right. All right, Mr. Workman, I'll hear you.

Mr. Workman: Your Honor, first of all, the General talked fifteen minutes in front of the jury, fifteen minutes in front of Your Honor about all these rights, but I haven't seen one citation of authority. What's wrong? If she's telling the truth, she's—if she told the truth then, she'll tell the truth now. Is he scared she won't tell the truth now? As I've tried to advise the Court, now everything up until the point we got is what happened. During this interview with this young lady, I got a phone call from Roxie Nelson's son after I talked to Roxie Nelson. And I told him over the phone—and he asked who do you represent, and I told him over the phone with her sitting in my office that I represent Noah Lundy. She said do you represent Mr. Lundy, and I said yes, and we went on with our interview and finished it. We were about half through when that was told to her definitely. And I don't know what he's screaming about. First of all, a witness in a criminal case is not the client [49] of the State. Second of all, there's no authority for all this....

Gen. Evans: (Inaudible)

Mr. Workman: The General is afraid the truth is going to be heard, and he don't want it to be heard....

Gen. Gill: We want the truth from her, not from something that he's put in her mouth. There was nobody with any legal education there to advise her about the questions he was asking her, about what they might mean. An experienced counsel can put words in anybody's mouth, and he knows it, and that's the reason that you have the rule of evidence....

Mr. Workman: (Inaudible)

Gen. Gill: (Inaudible) the right to have counsel present when anything like this happens.

The Court: Mr. Workman, did I understand you to say that in the initial part of your conversation you—on the front end of your conversation, you identified yourself?

Mr. Workman: I—the first time I talked to her on the phone I told her my name, that I was an attorney, I was involved in the Noah Lundy case, I would like to talk with you about it.

The Court: Did you tell her that you [50] represented Mr. Lundy?

Mr. Workman: Not at that time. No, I didn't say I did and I didn't say I didn't. I said I was involved in the case. If I send my law clerk out, Your Honor, or send a friend that's no lawyer and ask her what the facts are, what's the difference? During the conversation, Mr.—I forget Mrs. Roxie Nelson's son's name, but he called me on the phone, and she overhears me tell him that, and I tell her—she said do you represent Mr. Lundy, and I told her during the middle of the conversation.

The Witness: Can I say something?

Gen. Evans: Sure.

The Witness: That was after we finished. We had finished talking, then you got the phone call, and that's when you told me. You didn't tell me before, and I'm not lying either. And then after that, after you told me that, you said, well, after all

this is all over, wonder if you'll come back up here and see me sometime. That was his exact words. And I said, no, sir, I doubt it.

The Court: All right.

Gen. Evans: Your Honor, I've not changed my position. I think it's inadmissible and inexcusable to use that conversation to cross-examine.

Mr. Workman: If it is unethical, Your Honor, [51] then the Bar Association....

Gen. Evans: Well, I'm trying criminal cases and I consider Dale Workman a friend of mine, and I'm not going to file complaints against him with the Bar Association. I figure I can take care of my house right here in Criminal Court. I don't need to go out and try to get the Bar Association to do anything about it, because they won't do anything anyway. But I can take care of myself in Criminal Court. He knows and Your Honor knows why you got to tell them who you are, and he, also, knows why its important if we want somebody else or she wants somebody else to be there, for somebody else to be there, because we now have only two participants in that conversation, this young lady and an experienced trial attorney. I can just imagine how the questions went, the one thing he's gotten into so far about how many times did you have intercourse with Aaron Miller. I don't know. Well, ten times, twenty times. Yeah, well, more or less I guess. So now he's saying, well, didn't you tell me ten to twenty times. That girl never had any experience in any Criminal Court before or any kind of court before, and he can lead them down the primrose path. You take that guy over there, and he's had plenty of experience. You give me an hour alone [52] with him, and I'd have him admitting to wanting to assassinate Nixon. But that's why it's not cricket. And I say she's got just as many rights as he does.

The Court: Very well, gentlemen, the Court is not passing on the question of ethics, it is passing on the question of admissibility of evidence, particularly on an objection that has been raised to the question put to this witness whether she did or did not tell him a certain thing during a certain conversation. It appearing to the Court that the attorney did not identify himself as to the fact that he was representing the defendant in this case, he did not make this identification to this witness prior to putting these questions to her, that is, did not make his representation known to her prior to the time of presenting these questions to her, the Court then sustains the objection. However, counsel will be allowed to ask her other questions. I'm not cutting you off, Mr. Workman. You may ask her other questions....

Mr. Workman: What if I asked her something she told me about?

The Court: This is during that conversation, sir. Since you did not identify yourself as the attorney for Mr. Lundy, you will not ask her about [53] what she may have told you in that. Now, you may ask her questions about such other—such information as you have. In other words, don't refer to the conversation, but you may ask her about her prior relationship with these other individuals. I'm not cutting you off....

Mr. Workman: For my own direction, Your Honor, what is the authority for such? In other words....

The Court: The Court has just ruled....

Mr. Workman: For my own direction, Your Honor, what—is there a case on that?

The Court: There is now.

Gen. Gill: Of course, Your Honor, our objection is on the basis that due to the nature of this conversation, whatever she said and how the questions were asked and so forth, it wouldn't

be reliable to use for this purpose because of the situation. I think that's a reason for this duty to advise the people of this right.

Mr. Workman: In light of what the Attorney General said earlier, is the Court going to let the Attorney General argue to the jury that it is improper for the defense counsel to ask the prosecution witness questions without having an attorney general [54] present to advise her on some rights, which I'm not clear on what those....

Gen. Evans: No, no, I said if this got in, the ball game was not going to quit right here, that I was going to go into the whole shooting match. But if it doesn't get in, and the Judge rules it not admissible, as far as I'm concerned, the issue is concluded right now and should never be mentioned again. I won't mention it if it's not mentioned again. I guarantee you I'll mention it if it's mentioned again.

The Court: As to what the Court will rule or will not rule on in the future or as to how it will rule rather will depend upon the evidence as it presents itself at that time. All right. Bring back the jury, please.

THEREUPON, THE JURY RETURNED TO THE COURTROOM, AND AFTER THE CALL OF THE JURY WAS WAIVED BY BOTH PARTIES, THE FURTHER FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

The Court: All right. You may continue

Cross-Examination (Cont'd)

By Mr. Workman:

Q. Miss Murphy, have you discussed this case with the Attorney General? A. Yes, sir.

[55] Q. Did you discuss the facts and situation with the police officers? A. The detectives, yes.

Q. Did you give them a statement? A. Yes.

Q. Now, on this occasion, you went to the Family Pantry or what market was it? A. It's the Family Pantry now. Then it was Carl King's.

Q. Carl King? A. Yes.

Q. What road is that? A. Martin Mill Pike.

Q. Martin Mill Pike. And how far is that from where you were living? A. Just a little ways from Cook Drive. You get off Cook Drive and go down Joe Lewis Road and go across the street, and that was the store.

Q. Is this a mile, a half a mile, or what in your opinion? A. It's less than a mile. Not even a half a mile.

Q. When you came back out of there, you started up what road? A. I got across Martin Mill Pike and started....

* * * * * * *

Bench Conference

[88]* * * * * * *

The Court: This addresses itself to the discretion of the Court. I'll pass on it should it become....

Gen. Evans: Come down, Sharon.

Witness excused

THEREUPON, THE JURY WAS EXCUSED FROM THE COURTROOM, AND A RECESS WAS HAD, AFTER WHICH THE FURTHER FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

The Court: Gentlemen, before we proceed with the next witness, just as I went out, Mr. Workman stated to the Court

that he would like to reserve the right to call the prosecutrix for further cross-examination. In that connection, Mr. Workman, I wanted to ask you whether or not you did understand the Court's ruling with respect to the objection made to the questions pertaining to what the prosecutrix told you during...

Mr. Workman: As I understand, I can't ask her any questions about it.

The Court: At the same time, the ruling [89] that you could not ask her what she told you during that conversation. I think I made it clear to you then, at least I hope so, that you—I'm not cutting you off from asking her about her other experiences with these two young men that she's mentioned or anyone else that you can specifically name. In other words, I didn't want to cut you off from that, and....

Mr. Workman: As I understand it, I just can't ask her about anything she told me, am I correct?

The Court: During that one conversation.

Mr. Workman: I think I understand.

The Court: All right, all right. Very well, are you ready to resume?

Mr. Workman: Yes, Your Honor.

The Court: Very well. Bring the jury back.

* * * * * * *

Testimony Of Terri Tankersley

[112] Q. Do you remember one of the things I told you what we're going to have trouble with was you talking loud enough so everybody could hear you, right? A. Yes, sir.

Q. So talk up just a little. How long have you known the defendant, Terri? A. Since around '69.

Q. '69. And I believe at one time he went with your sister, didn't he? A. Yes, sir.

Q. Dated your sister. How long did he date your sister? A. About three or four months.

Q. Did you ever see him mistreat your sister?

Mr. Workman: Well, Your Honor, I really don't understand the materiality of all this.

Gen. Evans: Well, if you just give him time, I'm sure he'll figure it out.

The Court: Well....

Gen. Evans: Your Honor, if he wants me to explain it to him in front of the jury, I'll be glad to.

Mr. Workman: Your Honor, I don't know where he's trying to lead, but maybe we ought to let the jury step out and find out. I honestly do not [113] know what he's trying to get to.

The Court: Very well, gentlemen. I sustain the objection on the basis that it is leading. You may take your time and develop your case, General.

Q. Tell the jury whether or not you ever witnessed any difficulties between your sister, while she was dating the defendant, and the defendant?

Mr. Workman: Your Honor, I still don't see the materiality of this as to....

Gen. Gill: I would think the defendant's violent nature would be material to this case in the light of what the victim has testified to.

Mr. Workman: Your Honor....

Gen. Gill: I assume they claim that he's not this kind of a person, and we're trying to show that he is. That's the materiality.

Mr. Workman: Your Honor, if I may finish my statement, I don't see any materiality to this case. He's charged in this case with rape and crime against nature.

Gen. Evans: Are you finished now? I will explain, Your Honor. This young lady explained in detail that one of the reasons that she reacted the way she did was because of this advice she received from this young lady. I think it's proper to show **[114]** why this young lady was given the advice she was.

Mr. Workman: Your Honor, I think we're going to get into a long dissertation of the proof of what witnesses said and what they're going to say and maybe we had ought to have the jury step out.

The Court: Very well.

THEREUPON, THE JURY WAS EXCUSED FROM THE COURTROOM, AND THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

Mr. Workman: Your Honor, at this time, I would move on behalf of the defendant for a mistrial. The basis of that being, the General stated a statement of fact regarding the defendant as a violent man. I don't think that's at all an issue in this case. Further, I would object and move for a mistrial upon the statement of both generals about what they intend or attempt to prove with this witness about her advice as to why this girl did anything. If she saw this man beat up somebody else—if she had seen him beat up somebody else, it might be a reason for her having fear. But certainly, we haven't put any proof on as to what this girl is going to say. At this time, we move for a mistrial. I think all these things are completely prejudicial to our client. There's nothing we can do about it now. The jury has already heard it.

The Court: Very well.

Gen. Evans: Your Honor, the jury hasn't heard anything yet; and if they did hear anything, Your Honor, of course, can instruct them to disregard it if you decide the evidence is not competent. But I'm so sure that you're going to decide the evidence is competent that I'm not too worried about the motion for a mistrial. Now, on two issues, if this is a rape case where a man's violent nature is not involved, it's the first.

Mr. Workman: A man's violent nature is not involved until this man takes the witness stand, Your Honor. His character and reputation is not involved until he takes the witness stand.

Gen. Evans: I'm not talking about character and reputation. His nature, his violent nature, is involved, because force and intimidation and threats are involved in rape. So his nature is involved. Now, the problem I'm having communicating to anybody is that this girl gets in a car with two other people who are apparently friends. There's nothing to indicate to the contrary. And one of the reasons she does—gives for doing a lot of things is because of the advice and counsel she received from this girl. And I believe I have a right to show that **[116]** this girl's advice and counsel was well-founded, that she knew what she was talking about when she said you better do what he says, you know, and I want to get out of here before he wakes up and kills both of us. Those are elements that planted fear in this girl's mind. I think I have a right to show that this girl knew what she was talking about when she said that. Now, I realize these are not communicated threats in the sense that this girl knew about the beatings of this girl's sister, but I think it's important to show that this girl knew what she was talking about when she said that, because then the emphasis they had with Sharon will be evidence to the jury. When this girl said you had better do it, you better do what he says, it must have been said with some conviction, because this girl knew what this man was capable of when he had been drinking. I think I have a right to show this.

Mr. Workman: Your Honor, if I understand what the Attorney General is saying, he's saying that the State's theory is this, that it is a reasonable fear on this girl's part of this man, because this girl says so. That, Your Honor—if that's their theory, I don't think the case can stand period, because she must have a fear of him. This girl **[117]** telling her something is not (inaudible) by this man that can be held against her just to be a basis for the fear of the crime. He has to do something. He has to excite fear. The statement from this girl, you better do what he says, after all of this is over, after all the rape is over, what she says, I'm going to get out of here before he kills us both, can't be a valid reason for fear in regards to the commission of the rape, because it occurred after everything was over. That had absolutely nothing to do with this case, the reasoning or thoughts of the Attorney General. So what the Attorney General is trying to rely on is this girl may have been afraid of him when he was drinking, so, therefore, we can transfer this to this girl although she knows nothing about all this. She knew absolutely nothing about it, and I think the State will take the position that she knew nothing about all this. But they're relying on one statement essentially to make all this proof, they say, competent, the statement by this girl you better do what he says, and they will attempt to prove his character and reputation for being a violent person or will prove specific incidences. Those—only this girl can testify to, a witness to his reputation. This girl, if she had known he had done these things **[118]** as to a reason for her fear—could have testified about the things she knew, but this girl can't. In other words, they're relying—saying this girl had reason to be afraid of him when he was drinking, and she told her one time you better do what he says sometime before this rape, and that's good enough to get this proof in. That's just too farfetched, Your Honor. And again, we would move for a mistrial on the statements of counsel before the jury.

The Court: Very well, gentlemen. With respect to the last motion—I say last motion. Prior to that, there was an objection to the question and to the elicited answer to be obtained from this young lady about the previous conduct of the defendant, Mr. Lundy. There are two parts to this. First, gentlemen, considering both your objection and your motion for a mistrial here for a moment, there is a distinction between character reputation and the evidence of a prior offense. A witness does not necessarily—that is, the defendant does not have to be a witness for himself or put his character in issue actually before a prior offense can be considered if it has any relevancy upon the issue—upon the matter being tried. There are a number of incidences where prior offenses—I say prior offenses rather [119] than prior crimes, because there is a distinction. There are a number of incidences and circumstances where prior offenses may be properly entered as evidence in the case. Now, for these reasons, the motion for a mistrial is overruled. Now then, with respect to the objection to the question here, if the Attorney General is going into—at this point, the Court does not know what the evidence is going to be. The witness hasn't been asked the questions yet. But if we're going into one of these specific categories or incidences where a prior offense had some relevancy upon the case being tried, then it is admissible. But if it has—if it is not relevant to the case being tried, then it is not admissible. I mean if it is not material or relevant to the case being tried, then it is not admissible. So it is a question then of materiality and relevancy. So may I suggest that you may want to ask these questions in the absence of the jury to find out—so that the Court can pass on whether they're relevant or material or not.

Q. Terri, during the time that Mr. Lundy was going with your sister, did you see him beat her up or abuse her in any way? A. Yes, sir.

[120] Q. How many times? A. About twice.

Q. Had he always been drinking when this took place? A. Yes, sir.

Q. And you were concerned about what he would do when he was drinking, weren't you? A. Yes, sir.

Q. That's why you were concerned that night, wasn't it? A. Yes, sir.

Gen. Evans: That's the proof, Your Honor.

Mr. Workman: Your Honor, I'm not waiving my objection, but just to bring out the full....

The Court: Very well.

Cross-Examination

By Mr. Workman:

Q. When did these beatings occur? A. Sir?

Q. When—how long before this occurrence? A. When he....

Q. Before March—how long before March was it when you were suppose to have seen these things? A. About two years.

Q. About two years before?

[121] Mr. Workman: No further questions.

The Court: All right. Very well, gentlemen. The Court rules that this evidence is too far removed to be material and relevant. The objection to the prior offense testimony is sustained.

Mr. Workman: They will not be allowed to go into this?

The Court: Yes, the Court has ruled that it is not relevant. It is too far removed.

Gen. Evans: Your Honor, I request then that you, also, overrule their motion for a mistrial and instruct the jury to disregard whatever they heard before they left.

The Court: Very well, gentlemen. I have already overruled the motion for a mistrial, and the jury will be brought back and so instructed.

Gen Evans: Thank you, Your Honor.

The Court: All right. Bring the jury back.

THEREUPON, THE JURY RETURNED TO THE COURTROOM, AND AFTER THE CALL OF THE JURY WAS WAIVED BY BOTH PARTIES, THE FURTHER FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

The Court: Ladies and gentlemen of the jury, just prior to the time you were excused from the courtroom, a question was asked by the Attorney [122] General pertaining to whether or not this witness had observed or knew anything about any mistreatment of her sister on some prior occasion or occasions. The Court has sustained the objection by the defendant's counsel to this question as being immaterial and not relevant to the case on trial. You will not consider it for anything. You will not consider the question nor the answer. Put it out of your mind and consider it for nothing. All right. You may continue.

Gen. Evans: Thank you, Your Honor.

Direct Examination (Cont'd)

By Gen. Evans:

Q. Terri, you said you had known Mr. Lundy since 1969? A. Since—it was the last of '68, almost '69, when I met him.

Q. Okay. And how long had you gone with the defendant as his girl friend? A. About two months.

Q. Two months? A. Yes, sir.

Q. Now, on March 16th, 1973, when did you first see Mr. Lundy? A. At the end of February.

* * * * * * *

Testimony Of Miss Sharon Murphy, Jury-Out Hearing

[233] Direct Examination

By Mr. Workman:

Q. Miss Murphy, you are the same Sharon Murphy who testified yesterday in this case? A. Yes, sir.

Q. Did you or did you not tell me when I spoke with you that you had had intercourse with one Aaron Miller ten to twenty times... A. I don't remember if I said exactly that.

Q. Did you tell me you had had intercourse with one Danny Nipper four times? A. I remember telling you I had had intercourse with him, but I don't remember how many times I told you.

[234] Q. Did you tell me that the people you were living with, Roxie Foster and her daughter, did not like boys and did not date them? A. I don't remember saying that.

Q. Did you or did you not tell me as you approached Sims Road the girl told you to take your clothes off, and you asked if you had to do it? A. Mr. Lundy asked me to take my clothes off, and I looked at her and asked if I had to, and she said you better do as he says. He means business.

Q. Did you or did you not tell me that the lights were on when you got in the apartment? A. No, sir, I didn't. They were off when we got in the apartment.

Q. Did you or did you not tell me that after Terri Tankersley brought the water back to you, then you had something to drink? A. I drank some water first, and then he made me drink some whiskey, and I drank some water afterwards, after I drank the whiskey.

Q. But the water was brought to you before you started drinking the whiskey? A. Yes.

Q. Gen. Evans: Your Honor, may I clear up one thing for Sharon that I don't think she really [235] understands. What he's asking is, Sharon, what you told him down at that interview at his office; not what happened, but what you told him down at that interview at that office. That's why he's saying did you or did you not tell me such and such. All you have to do is say, yes, I told you that or no, I didn't tell you that or I don't remember whether I told you that. He's not asking you to go through all the facts again. He's just covering that interview down at his office.

The Court: That is the scope of this examination?

Mr. Workman: Yes, Your Honor.

The Court: All right.

Q. Did you or did you not tell me that when he made you lay down, he gently pushed you back down? A. No, sir.

Q. Did you or did you not tell me he made you put your arms around him? A. I don't remember if I said that.

Q. Did you or did you not tell me that he told you to go in the next room and lay on the table, and you went, and he came in sometime thereafter? A. Yes.

Q. Did you or did you not tell me that he said [236] he was going to keep you two or three days, and you said that was okay? A. Yes.

Q. Did you or did you not tell me that it was two hours from the time Terri Tankersley left and the time you left? A. I don't recall saying two hours. I don't remember exactly what I said.

Mr. Workman: That's all.

Witness excused

Mr. Workman: Now, in regard to the second indictment, the cunnilingus indictment, we would move the Court at this time to direct a verdict of acquittal as to the cunnilingus indictment for the following reasons:

Mr. Kressin: First of all, the only thing that I can see that this defendant can be charged with on this 7518 is that he was aiding and abetting a crime against nature. Now, a crime against nature, if cunnilingus is a crime against nature, then—and that crime is committed, there had to be some intent to commit that crime. Now, we've heard that Sharon Murphy performed that act on Terri Tankersley, so if anyone is guilty of any crime, then it's Sharon and/or Terri. Now, they have both gotten up here and stated they didn't want anything to do with this.

* * * * * * *

State's Rebuttal Summation Argument To Jury

* * * * * * *

[262] Gen. Evans: Ladies and gentlemen of the jury, I, of course, add to counsel for the defendant and General Gill's thanks for your service and our appreciation really, because I think jury service is the most important service a citizen can make to his country, because I don't believe that jury trials in criminal cases are fundamental to our democracy. It's the last real democracy we have in this country. This is the last forum in which individuals such as yourselves have a chance to literally decide how they want their community run. That's what General Gill addressed himself to. I am always chagrined that we get the last word, because it upsets defense counsel so much. It is one of the few advantages we have in a criminal case. Because we do have to open and we do have the burden of proof, the law allows us the right to get the last say to the jury. I'm sorry it upsets them, but I enjoy it. I won't spend too much time in rebuttal. I agree with many things Mr. Kressin said about giv-

ing fair consideration of the evidence and the presumption of innocence and [263] reasonable doubt and listening to the judge's charge; but about that point, we part company, because he said something about the gravity of the crime; and although I may not have caught the significance of that argument, I can not imagine in my own mind a worse crime being committed, a more personally humiliating crime being committed. Now, granted murder is much more final, but at least the person who is murdered doesn't have to come to court and talk about it, and I can't think of a more grave or upsetting crime than the ones we've heard here for the last two days. Now, if we have so much power and so many resources and so much moral influence, I hope it will be persuasive with you all. I wish we could have used that power, that influence, and that moral pressure on the night of March 16th and the early morning hours of March 17th, and then maybe we wouldn't have had this trial. I wish we could have protected her on that night from what she went through, and I'm glad we've got whatever we've got to bring this case to the people today and get something done about what happened that night and those early morning hours. Now, evidently, the defendant's theory of this case is that we are to believe the minor inconsistencies in the State's proof, and, of course, the State's proof is what we are considering. The only story we've heard about what happened from about 8:15 of the night of March 16th until about four o'clock in the morning of March 17th came from the State's witnesses. And we're suppose to think it's important whether or not he was asleep when we got there, the positions of the clothes [264] when the police got there, whether or not there's a padlock on the door, whether he was covered or not covered, when the clothes were taken off, whether she was or was not held on the bed, whether or not she was forced with his hands or just suggested that she drink whiskey, and whether or not she was really free to go, and whether or not at one time at one point she had her hands somewhere on his back. Now, the most damaging of those inconsistancies is the hands on the back charge by the former girl

friend of this punk and whether she left immediately. Now just for a second when you're back there wondering about that put yourself in Sharon Murphy's position on that bed in that apartment with the only ally of any kind that you had for the last three hours going out the door, because she's going to get out before she gets killed. And it's already established and Terri Tankersley admitted it, that she was scared to death. Every time they moved, he moved. And how long would you lay on that bed until you were darn sure you could get out and not get caught and not wake him up for another round of wonderful frolicking where again I guess we would have to worry about whether his clothes were on or off or the sheet was over him or not and whether there was a padlock on the door. Who cares? It's not important. And the hands on the back did not happen the first time unless I remember wrong. You all are the ones that finally determine. She said one time after she goes into the kitchen—she went into the kitchen after the first act of intercourse—Terri did—and then came back in; and at one time the second or third time of intercourse **[265]** saw hand or hands on the back.

Mr. Workman: Your Honor, I'm going to object. That's not the way I remember it, but it's up the jury which way they remember it.

The Court: Very well. That is correct. The jury will use its own recollection as to what happened or did not happen. All right.

Gen. Evans: Well, you all will remember it one way or the other. I don't think it's important, but remember that the basis of their argument is that you're suppose to believe the inconsistencies and not believe all the consistencies, not believe the threat of the tied socks. They made an issue out of that until we brought the socks in. You're not suppose to believe the statements these girls made right after the crime happened. Now, I like General Gill could not believe the words I was hear-

ing back when we started this case about how important it was to this defendant and how you, and I, and the judge, and everybody else, the court reporter, Mr. Brummitt, the court officer, all are going to forget about this case anywhere from a couple of days to a couple of years I guess, but it was real important to him. Well, I think it's pretty important to her. I don't think she'll ever forget what she went through that night out there. Now, she did one dumb act, and nobody's mentioned it. I'm surprised nobody has. She made the mistake of getting in that car. She should have had more sense. And the first question I asked that young lady when [266] I talked to her was why she got in the car, and she thought they were in the neighborhood, and it was raining, and she wanted to get a ride home. She's about as lazy as I am I guess. It's the stupidest thing she's ever done so far in her life, but it does not excuse what this man did to her from that point on. There is no excuse for that. Now, General Gill has addressed you on the thought of punishment, and evidently, the defendant's counsel agreed that the crime aginst nature is disgusting, vile, horrible and don't even want to talk about it as far as punishment is concerned, so we'll just accept fifteen years for that. We all agree that that is a bad (inaudible), and what he did with regard to a crime against nature is just horrible. They didn't even talk about the punishment for the crime against nature. All they were talking about was rape. I guess everybody agrees we'll take fifteen years for that. Now, with regard to rape, and if you don't believe she was raped, don't spend a lot of time arguing about it; just come back in and say not guilty. If you think she has to have a contract saying I will kill you if you don't cooperate before she has to be fearful, if you think she's got to be beaten to death before she resists enough, if you think all that is required, then don't find this guy guilty of rape. If you don't think she had a reasonable fear, if you don't think she did what she could and got out of there as quick as she could, if you don't think she was raped, turn him loose on the rape case. There seems to be no controversy about the crime against nature. On the other hand, if you think [267]

as I do, and I've never wanted to be on a jury more in a case I've tried, that this is one of the most despicable crimes I have ever heard testimony presented on in six years of being in prosecution, then I ask you in all sincerity for the reasons General Gill enumerated to protect my daughter, your daughters, your grandchildren, your sisters from this guy. Put him away forever. And I don't mean ten years, and I don't mean twenty years, and I don't even mean ninety-nine years. I mean forever. If you agree with me that it is as despicable as I feel it is, I want you to set a term that will let the world know what we think about this kind of crime in Knox County and at the same time will serve the purpose of protecting everybody in this state and in all states of this nation from this man, who thinks he can get a little drunk and do anything he wants to to anybody evidently. Somebody who has no more regard for concept of morality than he's been sleeping with a girl since she was twelve years old, who has no more concept of morality than who would urinate in a girl's mouth when she asks for a glass of water. And I want him away so long we never have to worry about him again, and I sincerely ask you to consider a term of years much higher than has ever been given in the State of Tennessee before. I don't think there's anything unreasonable about a term of years that will make sure he spends the rest of his life in the penitentiary, and that's a term way over the standard fifty or sixty or seventy years for rape.

Mr. Workman: Your Honor, I object to the **[268]** statement the standard fifty or sixty or seventy years for rape.

Gen. Evans: See, we never get the last word in.

Mr. Workman: I object to the Attorney General's comment.

The Court: Very well, ladies and gentlemen. There is no standard. Each case stands in accordance with the charge that is given to you and the evidence that has been presented to you. All right.

Gen. Evans: Of course, when you interrupt, you take the steam out. But I feel sincerely what I've said. And I don't want to tell you what amount of years, but I want to suggest that you seriously consider for both the reasons that General Gill mentioned. Put him away a long, long time. Again, thank you for your patience and consideration in this case.

* * * * * * * *

Portion Of Trial Court's Charge

* * * * * * * *

[291] The law presumes the innocence of the defendant, and that presumption stands as a witness for the defendant and maintains until it is overcome by satisfactory evidence of his guilt, and before he can be convicted, his guilt must be established beyond a reasonable doubt. Not a captious, possible or an imaginary doubt, but an honest doubt engendered after an investigation of the entire evidence and an inability after such investigation to let the mind rest easily as to the certainty of guilt.

The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, for every witness is presumed to swear the truth. In considering the evidence the jurors ought to look to the intelligence and respectability of the witnesses, their relationship, their interest, their feelings, their apparent fairness or bias, their means of knowledge, the reasonableness of their statements, their appearance and demeanor while testifying, their contradictory statements as to material matters, if any are shown, and all the evidence in the case tending to corroborate or to contradict them.

* * * * * * * *

Lundy's Brief Filed In The Tennessee Court Of Criminal Appeals

IN THE COURT OF CRIMINAL APPEALS
FOR KNOXVILLE, TENNESSEE

No. 283

State of Tennessee

v.

Noah Lundy

STATEMENT OF THE EVIDENCE

The defendant was sentenced to 120 years in the state penitentiary for rape (believed to be a record in this state) and not less than five and no more than fifteen years for a crime against nature to be served consecutively on the following facts.

The prosecutrix, Sharon K. Murphy, testified that she was 18 on March 16, 1973, and was living with a girl friend and her friend's mother at Apartment 58, Cook Drive, Montgomery Village, Knoxville, TN. (B.E. 20). Miss Murphy testified she had not lived with her parents since she was 17 because she and her mother did not "get along" and she was unemployed and not working. (B.E. 38). At 8:15 PM she went to a store and on her return she was walking on Joe Lewis Road when a car drove up with the defendant and Terri Tankersley, whom she had never met, and asked her if she wanted a ride. (B.E. 21-22).

Miss Murphy directed the defendant to her apartment, but they did not stop and the defendant told her to take her clothes off and told her to do it if "you don't want your brains knocked out" and she removed all her clothing. (B.E. 22, 23). She stated she calmly took her clothes off. (B.E. 24). That while riding, Miss Tankersley blindfolded her with a bra which Miss Murphy

had removed and the defendant "put his hand over in between my legs, and I slapped his hand back," but the defendant did not say anything to her in the car. (B.E. 24). Within ten minutes the car stopped, Miss Murphy put on her shorts and jacket, while still blindfolded with a bra, got out of the car, and walked out to an apartment. (B.E. 62). The defendant never spoke to her until after they were in the apartment. (B.E. 62-63). She asked to have the blindfold removed, which the defendant did. (B.E. 63, 64). The defendant told her to take off her clothes and get in bed, which she did without saying anything. (B.E. 25, 64).

Miss Murphy asked for a drink of water. The defendant had just taken his clothes off, and Miss Tankersley got her the water and the defendant "made" her drink some whiskey. (B.E. 26, 64). Miss Murphy did not attempt to cover herself up because during this entire period the defendant was holding both her hands with his hand. (B.E. 65). But he also held her head back and poured the whiskey down her throat. (B.E. 66). The defendant had not struck her. He told her to lay down on the bed and she began having intercourse with the defendant. (B.E. 67, 26). The defendant immediately began "kissing around" and "feeling" her breasts during intercourse. (B.E. 27). The intercourse did not last "too long" and her arms and legs were both free. (B.E. 27, 68).

Miss Murphy further testifed the defendant went into another room with her and made her perform fellatio on him and did strike her at that time when she pushed him away. (B.E. 29). Then Miss Murphy testified she got back in bed, with the defendant and Miss Tankersley, the defendant told Miss Murphy to perform cunnilingus on Miss Tankersley, which she did. (B.E. 30). Miss Murphy testified that she had intercourse again with the defendant, this time much longer. (B.E. 75, 31). Miss Murphy testified that the defendant did not reach a climax and she did not try to resist him. (B.E. 27, 70).

This Miss Murphy testified after the second intercourse:

> A. I said, well, I know you're tired, and I'm tired. I said, why don't you lay over there and go to sleep. And so he said, well, okay. He was in the middle, and she was by the wall, and I was on the outside of the bed. And so he finally went to sleep; and after he got to sleep...

Miss Murphy testified after the defendant went to sleep Miss Tankersley got up, dressed, tried to get her up, but she told Miss Tankersley to quit and go on. (B.E. 32). It was about two hours after Miss Tankersley left before Miss Murphy left. (B.E. 82). Dr. Herschell King testified he examined Miss Murphy at 2:15 AM on March 17, 1973, found the vagina showed some redness, indicating sexual play or coitus and the vagina seemed to indicate a person "sexually experienced". (B.E. 92). There was no vaginal injury and no spermatozoan was found. (B.E. 92).

Terri Tankersley, 14, testified for the state that she had been the defendant's girl friend for two months prior to March. (B.E. 122). Miss Tankersley testifed that after picking up Miss Murphy they drove behind U. T. Hospital, stopped the car, and then the defendant told Miss Murphy to take her clothes off. (B.E. 126). The defendant never grabbed Miss Murphy or threatened to knock her brains out. (B.E. 137 or 140). Miss Tankersley testified she told Miss Murphy no one was going to hurt her. (B.E. 141).

Miss Tankersley testified that the apartment door was not locked, did not have a lock, but only a bread and butter knife to hold it shut. (B.E. 128, 141). At one time during intercourse Miss Tankersley saw Miss Murphy's hands on the defendant's back. (B.E. 143). Miss Tankersley worked for 30 minutes trying to get Miss Murphy to leave the bed and Miss Murphy had no physical restraint on her so she could have physically gotten out if she had wanted to. (B.E. 147). Miss Tankersley left the apartment about midnight, met some friends, went riding around

and got back to her house at 5:30 AM the next morning. (B.E. 148, 149). She never heard the defendant threaten Miss Murphy during the entire evening. (B.E. 149). Sharon Murphy never screamed, tried to fight or physically resist in any manner. (B.E. 150).

Detective Robert Chadwell of the Knoxville Police Department testified he was the investigating officer who went to the apartment with the prosecutrix at 5th and Gill Streets. (B.E. 170-172). Detective Chadwell took a statement from the defendant at police headquarters, exhibit 2, that morning. (B.E. 176). Detective Chadwell testified as to what Miss Murphy told him the next morning. (B.E. 208-210). Detective Chadwell testified Miss Murphy told him that the defendant did not grab her at all in the car and the only threat was in regard to her getting in the middle. (B.E. 214, 215). Miss Murphy did not tell Detective Chadwell that her arms or hands were in any way restrained during the first intercourse. (B.E. 216).

The defense offered no proof.

ASSIGNMENTS OF ERROR

I

THAT THE EVIDENCE PREPONDERATES AGAINST THE VERDICT AND IN FAVOR OF INNOCENCE.

II

THAT THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE PROOF AS TO THE CHARGE OF RAPE.

III

THAT THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO QUASH AND/OR DEFENDANT'S MOTION FOR DIRECTED VERDICT OF NOT GUILTY FOR EITHER INDICTMENT 7517 OR 7518 IN THAT THE PROOF ESTABLISHED THERE WAS ONLY ONE COMMON INTENT.

IV

THE COURT ERRED IN REFUSING TO CHARGE THE JURY AS SPECIALLY REQUESTED BY DEFENDANT AS TO THE STATE'S ATTESTING FOR THE CREDIBILITY OF THE WITNESSES IT CALLS.

V

THE COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS TO THE STATE'S QUESTIONS ATTEMPTING TO IMPEACH TERRI TANKERSLEY.

VI

THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER THE OBJECTION OF THE DEFENDANT, A WRITTEN STATEMENT AS A WRITTEN "CONFESSION" BY DEFENDANT.

VII

THE COURT ERRED INTO EVIDENCE AND ALLOWING A WITNESS TO READ A WRITTEN STATEMENT OF THE PROSECUTRIX.

VIII

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A MISTRIAL AND ALLOWING THE STATE TO INTRODUCE AN ORAL READING OF A WRITTEN STATEMENT OF TERRI TANKERSLEY PREVIOUSLY HELD INADMISSIBLE.

IX

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A MISTRIAL FOLLOWING THE STATE'S INTRODUCTION OF TESTIMONY BY TERRI TANKERSLEY AS TO REMOTE, INADMISSIBLE, AND PREJUDICIAL PRIOR BAD ACTS BY THE DEFENDANT.

X

THE COURT ERRED IN CONVICTING THE DEFENDANT OF A CRIME AGAINST NATURE ON THE THEORY OF AIDING AND ABETTING.

XI

THE COURT ERRED IN LIMITING DEFENDANT'S CROSS-EXAMINATION AS TO PRIOR STATEMENTS MADE BY HER IN VIOLATION OF THE DEFENDANT'S RIGHTS SECURED TO HIM BY THE UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION.

XII

THE CONVICTION OF THE DEFENDANT ON THE CHARGED ACT OF CUNNILINGUS IS VOID AND INVALID BECAUSE SAID ACT IS NOT PROHIBITED AS A CRIME AGAINST NATURE IN T.C.A. §39-707.

XIII

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL OR A NEW TRIAL IN VIEW OF THE PREJUDICIAL CONDUCT OF THE ASSISTANT ATTORNEYS GENERAL IN THAT SUCH CONDUCT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL AS SECURED TO HIM BY THE UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION.

BRIEF OF LAW

I & II

THAT THE EVIDENCE PREPONDERATES AGAINST THE VERDICT AND IN FAVOR OF INNOCENCE.

THAT THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE PROOF AS TO THE CHARGE OF RAPE.

Carroll v. *State,* 212 Tenn. 464, 370 SW2d 523 (1963)

Jamison v. *State,* 220 Tenn. 280, 416 SW2d 768.

King v. *State,* 210 Tenn. 150, 357 SW2d 42 (1962).

Morelock v. *State,* _____Tenn. Cr. App. _____, 460 SW2d 861.

Pryor v. *State,* 217 Tenn. 695, 400 SW2d 700.

Taylor v. *State,* 455 SW2d 168

T.C.A. 39-3701

T.C.A. 40-2529

III

THAT THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO QUASH AND/OR DEFENDANT'S MOTION FOR DIRECTED VERDICT OF NOT GUILTY FOR EITHER INDICTMENT 7517 OR 7518 IN THAT THE PROOF ESTABLISHED THERE WAS ONLY ONE COMMON INTENT.

Carr v. *State,* _____Tenn. Cr. App._____, 455 SW2d 619 (1970).

Hayes v. *State,* _____Tenn. Cr. App._____, 470 SW2d 950 (1971).

Rockett v. *State,*_____Tenn. Cr. App._____, 475 SW2d 561 (1971).

IV

THE COURT ERRED IN REFUSING TO CHARGE THE JURY AS SPECIALLY REQUESTED BY DEFENDANT AS TO THE STATE'S ATTESTING FOR THE CREDIBILITY OF THE WITNESSES IT CALLS.

Cooper v. *State,* 123 Tenn. 37, 138 SW 826 (1909).

State v. *Silva,* _____Tenn._____, 477 SW2d 517 (1972).

Wiley v. *State,* 64 Tenn. 662, 5 Baxt. 662 (1875).

V

THE COURT ERRED IN OVERRULING DEFENDANT'S OBJECTIONS TO THE STATE'S QUESTIONS ATTEMPTING TO IMPEACH TERRI TANKERSLEY.

State v. *Silva,* _____Tenn._____, 477 SW2d 517 (1972).

VI

THE COURT ERRED IN ADMITTING INTO EVIDENCE, OVER THE OBJECTION OF THE DEFENDANT, A WRITTEN STATEMENT AS A WRITTEN "CONFESSION" BY DEFENDANT.

Collins v. *State,* 169 Tenn. 393, 88 SW2d 452 (1935).

Monts v. *State,* 218 Tenn. 31, 400 SW2d 722 (1966).

State v. *Moran,* 215 Tenn. 366, 385 SW2d 912 (1965).

Tines v. *State,* 203 Tenn. 612, 315 SW2d 111 (1958).

VII

THE COURT ERRED IN ADMITTING INTO EVIDENCE AND ALLOWING A WITNESS TO READ A WRITTEN STATEMENT OF THE PROSECUTRIX.

Carroll v. *State,* 212 Tenn. 464, 370 SW2d 523 (1963)

VIII

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A MISTRIAL AND ALLOWING THE STATE TO INTRODUCE AN ORAL READING OF A WRITTEN STATEMENT OF TERRI TANKERSLEY PREVIOUSLY HELD INADMISSIBLE.

Lyles v. *State,* 146 Tenn. 70, 239 SW 446 (1921)

IX

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A MISTRIAL FOLLOWING THE STATE'S INTRODUCTION OF TESTIMONY BY TERRI TANKERSLEY AS TO REMOBE, [SIC] INADMISSIBLE, AND PREJUDICIAL PRIOR BAD ACTS BY THE DEFENDANT.

Gray v. *State,* 191 Tenn. 526, 235 SW2d 20 (1950).

X

THE COURT ERRED IN CONVICTING THE DEFENDANT OF A CRIME AGAINST NATURE ON THE THEORY OF AIDING AND ABETTING.

Flippen v. *State,* 211 Tenn. 507, 365 SW2d 895 (1963).

State v. *Locke,* _____Tenn. App._____, 501 SW2d 826 (1973).

Stephens v. *State,* _____*Tenn. Cr. App.*_____, *489* SW2d 542 (1972).

XI

THE COURT ERRED IN LIMITING DEFENDANT'S CROSS-EXAMINATION AS TO PRIOR STATEMENTS MADE BY HER IN VIOLATION OF THE DEFENDANT'S RIGHTS SECURED TO HIM BY THE UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION.

Chapman v. *California,* 386 U.S. 18, 87 S. Ct. 824 (1967).

Davis v. *State,* 186 Tenn. 545, 212 SW2d 374 (1948).

Harris v. *New York,* 401 U.S. 222, 91 S. Ct. 643 (1971).

Huffman v. *State,* Tenn. Cr. App., 548 SW2d 29 (1970).

Miranda v. *Arizona,* (citations omitted).

Pointer v. *Texas,* 380 U. S. 400, 85 S. Ct. 1065 13 L. Ed. 2d 923 (1965).

XII

THE CONVICTION OF THE DEFENDANT ON THE CHARGED ACT OF CUNNILINGUS IS VOID AND INVALID BECAUSE SAID ACT IS NOT PROHIBITED AS A CRIME AGAINST NATURE IN T.C.A. §39-707.

Fisher v. *State,* 197 Tenn. 594, 277 SW2d 340 (1954).

Garrad v. *State,* 194 Wis. 391, 216 N.W. 498 (1927).

Riley v. *Garrad,* 219 Ga. 345, 133 S.E. 2d 369 ( ).

Sherrill v. *State,* 204 Tenn. 427 SW2d 811 (1959).

Stephens v. *State,* _____Tenn._____, 489 SW2d 542 (1973).

XIII

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL OR A NEW TRIAL IN VIEW OF THE PREJUDICIAL CONDUCT OF THE ASSISTANT ATTORNEYS GENERAL IN THAT SUCH CONDUCT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL AS SECURED TO HIM BY THE UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION.

Dupree v. *State,* 219 Tenn. 492, 410 SW2d 898 (1967).

Marable v. *State,* 203 Tenn. 440, 313 SW2d 451 (1958).

Watkins v. *State,* 140 Tenn. 1, 203 SW 344 (1917).

23A C.J.S. §1081, pages 85-87.

* * * * * * * *

(Pages 1-26 of original brief omitted in printing)

IX

THE COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A MISTRIAL FOLLOWING THE STATE'S INTRODUCTION OF TESTIMONY BY TERRI TANKERSLEY AS TO REMOTE, INADMISSIBLE AND PREJUDICIAL PRIOR BAD ACTS BY THE DEFENDANT.

This Assignment of Error arises as a result of the state's attempting to put into evidence wholly inadmissible and prejudicial testimony by witness, Terri Tankersley, as to what she had seen between the defendant and her sister approximately two years prior to the incident in question, (B. E. 120).

The Attorney General asked Miss Tankersley if she had ever seen the defendant strike her sister. The defendant objected as to materiality. Defense counsel asked that the jury be excused so that the court and defense counsel could hear the proof the state intended to introduce. (B.E. 112). The court sustained the objection to the question as leading and allowed the Attorney General to proceed. (B.E. 113). Defense counsel then reiterated for objections as to materiality and the following statements occurred in front of the jury:

> Gen. Gill: I assume they claim that he's not this kind of a person, and we're trying to show that he is. That's the materiality.
>
> . . .
>
> Gen. Evans: Are you finished now? I will explain, Your Honor. This young lady explained in detail that one of the reasons that she reacted the way she did was because of this advice she received from this young lady. I think it's proper to show why this young lady was given the advice she was.

> Mr. Workman: Your Honor, I think we're going to get into a long dissertation of the proof of what witnesses said and what they're going to say and maybe we had ought to have the jury step out.
> (B.E. 113, 114)

Defense counsel then moved the court for a mistrial of statements of the Attorney General and the attempted offer of proof. (B.E. 114). The court then asked the state to offer the proof out of the presence of the jury and Terri Tankersley testified that twice she had seen altercation between the defendant and her sister and on cross-examination she stated that these occurrences were approximately two years prior to the date of this case. (B.E. 119-120). The court overruled the motion for a mistrial and told the jury to disregard any question as to mistreatment of the witness' sister by the defendant. (B.E. 121, 122).

In *Gray* v. *State,* 191 Tenn. 526, 235 SW2d 20, the Supreme Court in detail discussed attempted offers of evidence, such as that involved in this case and the prejudicial nature thereof. As stated in that case, the character and reputation of the accused is not an issue unless the defendant offers proof as to his good character and there is a presumption of good character unless defendant puts it at issue.

In *Gray* v. *State, supra,* the state attempted to introduce statements that the defendant had beat his wife some two years prior to the occasion of that crime and the court stated:

> ...the manner in which it was handled was done clearly to the prejudice of the plaintiff in error...facts and circumstances which were not at issue in the instant law suit and did not bear in any way upon the guilt or innocence of the plaintiff in error. The introduction...through this method was clearly prejudicial to the plaintiff in error. (235 SW2d 20, 22)

The trial court in the Gray case, *Supra,* had sustained the defendant's objections, but the appellate court reversed as a result of the prejudicial attempt of the Attorney General.

Certainly, the indication of the question asked by the Attorney General and combined with comments in front of the jury even with the instructions of the court, left with the jury a bad impression as to defendant's character. Had the proof referred to been in any way material to the issue in the lawsuit, or perhaps even closer in time to the date of the alleged rape, it might be a harmless overstepping by the Attorney General. But, in light of the remoteness of the proof and its complete inadmissibility, the attempt by the Attorney General to offer it and then by comments in front of the jury make this situation a prejudicial error necessitating reversal.

* * * * * * *

(Pages 31-43 omitted in printing)

XIII

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL OR A NEW TRIAL IN VIEW OF THE PREJUDICIAL CONDUCT OF THE ASSISTANT ATTORNEYS GENERAL IN THAT SUCH CONDUCT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL AS SECURED TO HIM BY THE UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION.

During the trial, counsel for the State made remarks which reflected on defense counsel's integrity before the jury. This continual behavior had the effect of prejudicing the defendant in the eyes of the jury and thus denying him a fair trial secured to him by the United States Constitution by the Sixth Amendment and the Tennessee Constitution by Article 1, Section 9.

The duties of a prosecuting attorney are on a higher scale than merely trying to secure a conviction.

> The prosecuting attorney must conduct the trial in accordance with the rules of law,..., particularly where accused is defended as a poor person. He should not ... say or do anything which might improperly affect or influence the jury ... He should not ... make remarks or insinuations calculated to impress the jury against accused; interrupt accused's counsel in such a manner as unduly to influence the jury; ... 23A C.J.S. §1081, pages 85-87.

With this brief statement as to some of the duties and responsibilities of the attorneys general, it becomes apparent from looking at the record as a whole that there was a certain amount of misconduct engaged in by the State's counsel. For example the effect on the jury from General Evan's remark concerning the manner in which Mr. Workman conducted his interview of the prosecutrix. (B.E. 43-45). It was made to appear that Mr. Workman was a sly individual who had a habit of inviting unsuspecting witnesses to his office to coerce contradictory statements from them. The jury was never told that the attorney general had no right to be present when a defense attorney was conducting an interview with the witness.

Tennessee Courts have considered this problem many times. The question of the attorney general's remarks in closing were considered in *Watkins* v. *State,* 140 Tenn. 1, 203 S.W. 344 (1917). In this case the Tennessee Supreme Court reversed a conviction where the district attorney general made disparaging remarks about defense counsel's taking exception to the attorney general's remarks in closing. The Court said, after reviewing the district attorney general's argument:

> The state does not require or expect of its prosecuting officer that he turn upon an accused, shake his finger in the face of the latter, and address him in abusive and denun-

> ciating terms. By the law of the state one on trial has extended to him the presumption of innocence, during the entire trial up to the verdict, and of this the prosecuting official should not be unmindful. *Watkins* v. *State, supra* at 346.

Similar language as that used in *Watkins* may be found in the closing argument of counsel for the state. (B.E. 265-267). Further statements of how an interview was conducted by Mr. Workman led one to believe that a certain amount of dishonesty was involved. To this type of remark the Court made this statement:

> Imputation of dishonesty to adversary counsel in remarks addressed to (counsel) by the district attorney touching their conduct of the defense was an impropriety so gross that it must now appear to be such to the official who gave the words utterance. A stern rebuke at the time should have come promptly and voluntarily from the presiding judge... *Watkins* v. *State supra* at page 346.

In another case, *Marable* v. *State,* 203 Tenn. 440, 313 S.W. 2d 451 (1958), the conduct of the district attorney general was considered. There apparently was bantering back and forth between counsel for both parties. The Court decided that even though the argument was highly improper, there was no prejudice shown to the defendant. The test for this apparently is this:

> We must look at it here as a jury of fair and honorable men and women who will have heard the evidence and who will take the charge of the Court as the law of the case. *Marable* v. *State, supra* at page 460.

In the case presently before this Court, the behavior that was imputed to Mr. Workman by not having the member of the attorney general's staff present during an interview could be

nothing but prejudicial. The jury not being schooled in law, does not know that the attorney general has no such right.

Assuming that the comments made by the district attorney general were improper, in some cases it has been indicated that prejudice to the defendant must be shown. It would seem that by imposing a sentence that appears to be the longest ever given anyone in this state must show at least some prejudice. Additionally the defendant would direct this honorable court's attention to the case of *Dupree* v. *State,* 219 Tenn. 492, 410 S.W. 2d 890 (1967). The Tennessee Supreme Court reversed the conviction because of intemperate remarks made by the district attorney general. The Court made the following statement:

> This Court has not hesitated to reverse convictions when obtained, wholly or in part, by improper and intemperate argument by the district attorney general. (citations omitted) *Dupree* v. *State, supra* at 892.

Here there can be no doubt that "wholly or part" of this conviction was obtained by these remarks. The Defendant would therefore respectfully ask that this Court reverse and remand this case for new trial.

Submitted this 28th day of January, 1974.

DALE C. WORKMAN
Appointed Counsel

GEOFFREY D. KRESSIN
Appointed Counsel

LUNDY'S BRIEF FILED IN THE TENNESSEE SUPREME COURT

TO THE HONORABLE SUPREME COURT OF THE
STATE OF TENNESSEE AT KNOXVILLE
OR TO ANY OF THE JUSTICES THEREOF

No.

Noah Lundy
Plaintiff-In-Error

vs.

State of Tennessee
Defendant-In-Error

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI OF NOAH LUNDY

Plaintiff-in-Error and Petitioner, Noah Lundy, in accordance with §27-821 of Tennessee Code Annotated relies upon pages 1-47 of his brief filed in the Court of Criminal Appeals which is attached hereto.

In reference to Assignments of Error X, XI and XIII, Petitioner feels that the opinion of the Court of Criminal Appeals as to these issues requires further discussion not contained in the brief previously filed.

As to the other Assignments of Error contained in the brief to the Court of Criminal Appeals, the authorities are clearly cited and strongly urge that the Court of Criminal Appeals was in error in its decision. As to the particular issues raised by the Court of Criminal Appeals opinion in regard to: whether the petitioner can be convicted of the indictment charging crime against nature as an aider and abetter when there is no principal involved; as to Petitioner's rights under the Constitution of the United

States of effective assistance of counsel and the right to confrontation; and, the effects of comments of the Attorney General which the Court agrees were improper.

* * *

(Pages 3-5 of original brief omitted in printing)

XIII

THE TRIAL COURT ERRED IN NOT GRANTING A MISTRIAL OR A NEW TRIAL IN VIEW OF THE PREJUDICAL CONDUCT OF THE ASSISTANT ATTORNEY GENERAL IN THAT SUCH CONDUCT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL AS SECURED TO HIM BY THE UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION.

The Court of Appeals stated "counsel was unduly critical of defense counsel". Page 9. In light of what occurred in this cause and the repeated problems, certainly that is an understatement. As admitted in the reply brief of the State filed in the Court of Criminal Appeals, even the counsel for the State on appeal after reading the record, felt that the statements were not unintentional or rarely made during the course of the trial.

"There was a good bit of acrimony throughout this trial between defense counsel and state's attorney". State of Tennessee reply brief, page 19.

Petitioner would ask the court to review those parts of this record involving statements by Attorney General upon making Motions, attempting to offer proof which was without question inadmissible and particularly following the objection to cross-examination of the prosecutrix and during the final agrument. B. E. 43-45, 265-267, 113, 144.

As stated in the brief filed in the Court of Criminal Appeals, *Watkins* v. *State,* 140 Tenn. 1, 203 SW 344, deals at length with the responsibility of the Attorney General as to his actions and comments during a trial and particularly page 346 of that Opinion the Court admitted it is to the reversible error of comments as to adversary counsel's actions.

As further stated in *Dupree* v. *State,* 219 Tenn. 492, 410 SW2d 890 (1967) the Court stated that the Supreme Court would not be hesitant to reverse on a conviction affected by the intemperate action by the Attorney General.

Considering that the Petitioner receives a sentence of 120 years for rape, the longest single sentence ever given in Knox County, the Court must feel that the actions and comments of the Attorney General got the desired result.

Considering all 13 Assignments of Error in the original brief and those matters herein, Petitioner asserts that this matter in all good conscience and justice should be reversed and remanded for a new trial.

Submitted this 15 day of October, 1974.

DALE C. WORKMAN
Counsel for Plaintiff-In-Error

GEOFFREY KRESSIN
Counsel for Plaintiff-In-Error

OPINION OF THE TENNESSEE COURT OF CRIMINAL APPEALS

IN THE COURT OF CRIMINAL APPEALS
OF TENNESSEE
KNOXVILLE, APRIL, 1974
No. 283

Knox County

Hon. Richard R. Ford, Judge

(Rape and Crime Against Nature)

Noah Lundy,
Plaintiff-in-Error

v.

State of Tennessee,
Defendant-in-Error

For the Plaintiff-in-Error:

Dale C. Workman and
Geoffrey D. Kressin
Knoxville, Tennessee

For the Defendant-in-Error:

David M. Pack
Attorney General

Bart Durham
Assistant Attorney General

Lance D. Evans and
John W. Gill, Jr.
Assistant District Attorneys General

Opinion Filed: Aug. 30, 1974

AFFIRMED

WILLIAM S. RUSSELL,
Judge

OPINION

The plaintiff-in-error, Noah Lundy, indigent and represented by appointed counsel, appeals his convictions for rape and a crime against nature and consecutive penitentiary sentences of one hundred twenty (120) and five (5) to fifteen (15) years.

The alleged rape victim, Sharon Murphy, was enticed into Lundy's automobile by Lundy's fourteen-year-old female companion, Terri Tankersly, at his direction, on the pretext of giving the victim a ride home. Miss Murphy had walked alone to a neighborhood market to purchase solft [sic] drinks shortly after 8 p.m. It had begun to rain. She entered the car in response to an offer of a ride in the belief that the couple lived in the neighborhood. Lundy did drive her past the apartment where she was living, but refused to stop the car. The victim testified that after passing her home Lundy restrained her by grabbing her arm, subsequently ordered her to change places with the other girl by moving to the center seat position, and as they continued to drive ordered her to remove all of her clothing. The victim asked Terri Tankersly if she had to, and was given an affirmative answer. Lundy told the victim that he would knock her brains out if she didn't undress. Scared and crying, Miss Murphy completely disrobed. Lundy put his hand between her legs, she slapped it and he removed it. At Lundy's direction Terri Tankersly blindfolded the victim with Miss Murphy's bra.

When the three arrived at Lundy's apartment the victim was allowed to put back on her shorts and jacket and was led inside. Terri Tankersly brought the balance of her clothing. Once inside the apartment Lundy ordered to her to completely disrobe again, and to get upon the bed. Her blindfold was removed at her request. He also undressed. The victim asked for a drink of water, which the other girl got for her. Lundy made her drink some whiskey from a bottle from which he was imbibing. He then ordered Miss Murphy to lie on the bed. She testified that he took her hands and held them up over her head as he commenced intercourse.

Miss Murphy at no time fought, screamed, ran or in any way resisted the intercourse. No weapon was ever used or displayed by Lundy. Miss Murphy was conerned that they would hurt, or kill her; and begged them not to. It seems fair to say that the victim was more apprehensive about possibly being hurt or killed than she was about being sexaully violated, as she was passively submissive. It cannot be denied, however, that she was totally within the power of her captors, and her obedience to submission orders must be weighed in that context.

After the first act of intercourse, which apparently did not result in a sexual climax for Lundy, he ordered Terri Tankersly to put a cloth on the kitchen table. He then ordered the victim to go to the kitchen and lie upon her back upon the table, with her head hanging over the edge. He threatened to knock her brains out if she didn't comply. When thus positioned, he ordered Miss Murphy to open her mouth, and "he stuck his penis down my throat". She gagged and pushed him away, at which time he viciously struck her with his fist upon the cheek, the mouth and the forehead. The victim commenced crying again. He made her lie back down again, and inserted his penis down her throat and moved it in and out, and she started to vomit and pushed him away again. He struck her with his fist upon the abdomen and upon the right side. She got off the table, crying, and asked for a drink of water. His response was to make her get down on her knees and he urinated in her mouth, making her swallow most of the urine.

Lundy then ordered the victim back into the bed, already occupied by the disrobed Terri Tankersly. He first ordered Miss Murphy to insert her finger into the other girl's vagina and manipulate it, despite Terri Tankersly's begging him not to. After this was done he ordered Miss Murphy to suck the other girl's vagina. When compliance did not suit Lundy, he struck Miss Murphy twice upon the back of her head with his fist. She then performed the cunnilingus for about two minutes before

becoming sick. He then allowed her to stop. Terri Tankersly testified that while Miss Murphy was performing cunnilingus upon her that Lundy was "trying to have relationship with her in her rear end".

Finally, Lundy had normal intercourse with the victim again, for more than thirty minutes, without ever reaching a climax. He discussed tying Miss Murphy to the bed and keeping her for two or three days, and even had the other girl to tie some socks together to use for bindings. However, at the victim's suggestion, he went to sleep. Significantly, Terri Tankersly, the fourteen year old companion of Lundy and with whom he had admittedly been having sexual intercouse for years, fled the apartment as soon as Lundy was asleep. She tried to get Miss Murphy to go with her, expressing the fear that he was going to kill both of them; but the victim was afraid to leave at that time for fear of awakening Lundy, who had an arm and leg across her. Some two hours later, when he turned over, she fled the premises, hailed a passing taxi, and immediately reported having been kidnapped and raped.

All of this obscene detail has been necessary to this opinion because of the serious question raised as to whether the intercourse was forcible rape. No weapon was ever exhibited, and no resistance was offered. Both sides rely upon the case of *King* v. *State,* 210 Tenn.150, 357 S.W.2d 42 (1962). Unquestionably the act to constitute rape must be forcibly done and against the will of the female. Force means power, compulsion or strength directed toward an end. And against her will means against or without her consent express or implied. *King* v. *State, supra.* Whether force was used is a jury question. In this case, apparently no significant force was directly employed in conjunction with the acts of normal intercourse. The victim was told to submit and she did. But, in context, it cannot be said that she consented, nor can Lundy seriously contend that she did. At all times she was a captive, in justified fear for her very life. Admit-

tedly having had some prior sexual experience, she chose to submit to avoid injury or even death. Consent obtained by force or fear due to threats of force is void and the offense rape. *1 Wharton's Criminal Law and Procedure* 649, §311. Her tacit consent by non-resistance has been found by the jury to be no consent under the circumstances. She did not consent to being kidnapped and imprisoned; and it was in that context that she was raped. It would be an unreasonable misapplication of the law to require as a matter of law that a captured female be required to incur a beating before it could be said that demanded intercourse with her was rape. The force and restraints inherent in the situation supply the forcible character to the act. We hold in response to the first two assignments of error, that the convicting evidence on the charge of rape is legally sufficient to support the conviction and that it was not error for the trial judge to refuse to direct a not guilty verdict. A jury question was certainly presented by the proof.

The cunnilingus which Lundy forced the two girls to engage in is the basis for his crime against nature conviction. It is assigned as error that both convictions cannot stand because "there was only one common intent". It is clear under these facts that different evidence is required to establish the two different acts, and that a different and separate intent was reflected. The assignment is overruled. See *Ward* v. *State*, Tenn.Crim.App., 486 S.W.2d 292; *Harris* v. *State*, 206 Tenn.276, 332 S.W.2d 675; and *Rockett* v. *State*, Tenn.Crim.App.475 S.W.2d 561. Error is assigned upon the trial court's refusal to charge a certain "special request". It was defense counsel's theory that the State could not impeach any of the testimony of Terri Tankersly, whom they had called as a prosecution witness, and a note was passed to the trial judge, in response to his invitation for special requests, asking him to charge the law relative to the State's attesting to the credibility of the witnesses it calls. No specific language was tendered; so, in legal affect, no special request was made. The note said:

"Defendant Noah Lundy requests the Court to give its standard and normal charge that one party to the case calling a witness in its behalf makes that person that side's witness and the legal effect thereof as to the other testimony being binding and the side calling the witness attesting for credibility". The charge as given was correct. If more specificity and enlargement on a given point was desired it was necessary to tender the exact charge requested. The trial judge noted: "Refused. Ambiguous and unclear. The Court's charge was adquate as given". We need not reach the question of sunstantive law sought to be raised, because the "special request" was not in a proper form to raise it. However, no authority is cited for the theory, if it be plaintiff-in-error's theory, that a criminal court judge must charge the jury that the State vouches for the credibility of each and every one of its witnesses, and is bound by their testimony. The assignement is overruled.

A related assignment complains that the State was permitted to ask questions of Terri Tankersly, their witness, which were of an impeaching nature. We do not find that this happened. On redirect examination she was asked questions which amplified her answers upon cross-examination, as was proper.

Error is assigned upon the admission into evidence of Lundy's written statement to officers, voluntarily given after full warnings. The sense of the assignment seems to be that the statement was not a full confession, so was inadmissible as a confession. It was admissible for whatever probative value that it had upon the issue of guilt, and the assignment is overruled.

The next assignment has to do with the victim's report to officers immediately after her escape. She gave them a detailed account of the events, substantially as she testified to them. One of the officers was permitted to testify as to exactly what she reported by referring to the written statement which he took from her. It is well settled that the report of a rape victim, given within a reasonable time after the fact, is competent evidence.

King v. *State, supra.* That the report was reduced to writing adds to the accuracy of the officer's testimony, and certainly does not render the otherwise competent evidence incompetent.

The next assignment of error relates to the statement of Terri Tankersly, also given to officers shortly after the crime. Complaint is made that this statement was incompetent evidence. We find that this evidence was first gone into on cross-examination and thus made competent. The trial judge committed no error.

Error is assigned because of an attempt by the State to prove that Lundy had physically abused Terri Tankersly's sister years before in a totally unrelated occurence. The trial court properly excluded the evidence and instructed the jury to disregard the question. State's counsel made some remarks in the presence of the jury that were overly zealous in support of this incompetent line of proof, and in a different case could constitute prejudicial error. State's counsel alluded to "the defendant's violent nature" as being a matter of fact; and said that the State was trying to show that he was "that kind of a person". However, in the context of the undisputed facts of this case we hold any error to have been harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S.18, 87 S.Ct.824, 17 L.Ed.2d 705(1967); *Huffman* v. *State,* _____Tenn.Crim.App._____, 458 S.W.2d 29 (1970).

The next assignment of error is that the Court erred in convicting the defendant of a crime against nature on the theory of aiding and abetting. Another related assignment is that the conviction on the charged act of cunnilingus is void and invalid because cunnilingus "is not prohibited as a crime against nature in T.C.A.§39-707".

This Court has recently held, in the context of a case of forcible cunnilingus committed by the defendant upon a victim, that the act was a crime against nature as proscribed by T.C.A.§39-707. *Locke* v. *State,* Tenn.Crim.App., 501 S.W.2d 826(1973). Again, in the case sub judice, you have the element

of coercion, this time motivating both of the literal participants. Here, the direct participants were both female. Plaintiff-in-error contends that neither of the females was committing a crime under the circumstances, and reasons that there was no principal criminal whom Lundy could have been guilty of aiding and abetting.

Lundy was not indicted as an aider and abettor. He was charged: "***unlawfully and feloniously did commit a crime against nature in and upon one Sharon K. Murphy; that is to say, that the said Noah Lundy, Alias, did make, force and compel the said Sharon K. Murphy to perform an act of cunnilingus upon the said Terri Tankersly, a female,***".

The evidence certainly supports the factual allegations of the indictment. Lundy was not accused of aiding and abetting, but of forcing the commission of the proscribed act. Whether Sharon K. Murphy is called the victim, or Terri Tankersly, or nobody, is really immaterial. Crimes against nature may be victimless, with both parties as accomplices of one another; or they may involve an innocent person forced to participate, or incapable of consenting. In the case sub judice, both of the females were victimized.

The trial judge did charge the law of principal guilt by being present, aiding and abetting, as set out in T.C.A.§39-109, as follows:

> "39-109. Aiders and bettors deemed principal offenders. — All persons present, aiding and abetting, or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders, and punished as such."

We also have a statute which provides for the conviction of an aider and abettor whether the principal offender has been convicted or not. T.C.A.§39-110. That statute does, however, presuppose that a principal exists; while in the instant case Lundy is himself the only principal. By forcing others to do an

act which society has proscribed Lundy is himself directly responsible. The force and coercion was his active contribution to the cunnilingus. While the judge's charge dealt with aiding and abetting, and with conspiracy, and did not directly charge the jury that Lundy would be himself criminally chargeable with acts which he forced others to perform, the charge did say" [sic] "If, therefore, you find from the proof beyond a reasonable doubt that this offense has been committed by the defendant in manner and form as charged in the indictment * * * the defendant is guilty of the crime against nature and you should convict him of this offense* * *". In the absence of a special request for further instructions, we do not find reversible error in the charge. While the questions presented by the factual situation in this case are fuel for an academic trip of almost limitless dimensions, and would delight any law professor, we confine ourselves to holding that forced cunnilingus is a crime against nature, and that Lundy was more than an aider and abettor and was convicted under the indictment as the principal offender who forced the criminal act. No other principal is necessary to his conviction.

Error is assigned upon the trial court's ruling that defense counsel could not cross-examine the victim by asking her about specific statements that she supposedly made to defense counsel in a pre-trial interview in defense counsel's office. The predicate for this ruling was the fact that defense counsel did not tell the witness that he was counsel for the defendant, but only that he was a lawyer in the case. The final assignment of error is related to this one, in that it accuses State's counsel of making prejudicial remarks about defense counsel during argument before the jury about the admissibility of these questions.

We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not

believe that defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming case before questioning a witness. He apparently made no misrepresentation, and was apparently seeking the truth. State's counsel was unduly critical of defense counsel in indicating before the jury that State's counsel should have been present at the interview, etc., but we hold this error to be harmless in the context of this case.

We have carefully examined all assignments of error. We affirm the convictions.

William S. Russell, Judge

CONCUR:

W. Wayne Oliver, Judge

Robert K. Dwyer, Judge

OPINION OF THE KNOX COUNTY CRIMINAL COURT DENYING LUNDY'S STATE PETITION FOR POST-CONVICTION RELIEF

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE

NO. C412

Noah Lundy

vs.

James H. Rose

OPINION

Lundy contends that his attorneys, Dale Workman and Geoffrey D. Kressin were incompetent of representing him at his trial for rape and crime against nature. The Bill of Exceptions in the *State of Tennessee* v. *Lundy,* case numbers 7517 and 7518 was filed as Exhibit number 1 in the cause and the court spent several hours studying this exhibit.

Lundy's trial attorneys used every legitimate tactic including motions to quash the indictment and an attack upon the constitutionality of TCA Section 39-707. His attorneys interviewed the prosecution's witnesses and other witnesses that testified against Lundy. Lundy committed a heinous crime and the jury fixed his punishment at a total of one hundred and thirty-five years in the State penitentiary. Lundy admitted, while testifying in the cause, that Mr. Workman had worked out a deal with the Attorney General for Lundy to plead guilty to both crimes and serve the minimum term for each crime with the sentences to run concurrently. In effect, Lundy, by his own decision, increased his term of imprisonment by one hundred and twenty-five years. While on the stand he admitted that in all probability

that his attorneys had an incompetent client, and with this the court agrees. His attorneys performed up to the standards set down by our Supreme Court in the case of *Baxter* v. *Rose,* 523 SW 2d 930.

An order shall be drawn dismissing this petition.

This the 3rd day of May, 1976.

Sidney Davis
Judge

LUNDY'S FEDERAL PETITION FOR RELIEF UNDER §2254

FORM FOR USE IN APPLICATIONS FOR HABEAS CORPUS UNDER 28 U.S.C. §2254

Name Noah Harrison Lundy

Prison Number 72638

Place of Confinement Tennessee State Penitentiary Station A West, Nashville Tennessee.

United States District Court Middle District of Tennessee.

Case No. (To be supplied by Clerk of U. S. District Court)

(Full name) (Include name under which you were convicted) Noah Harrison Lundy, PETITIONER

v.

(Name of Warden, Superintendent, Jailor, or authorized person having custody of petitioner) MR. VINSON THOMPSON (WARDEN), RESPONDENT

and

THE ATTORNEY GENERAL OF THE STATE OF TENNESSEE, ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

INSTRUCTIONS—READ CAREFULLY

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner, and a declaration under penalty of perjury that the information contained herein is true and correct must be signed by the petitioner. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form. Where more room is needed to answer any question use reverse side of sheet.

(2) Additional pages are not permitted. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5.00 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee, you may request permission to proceed *in forma pauperis,* in which event you must execute the affidavit on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed *in forma pauperis,* you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution. If your prison account exceeds $_____, you must pay the filing fee as required by the rule of the district court.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, *the original and two copies must be* mailed to the Clerk of the United States District Court whose address is MIDDLE DISTRICT OF TENNESSEE OFFICE OF CLERK, UNITED STATES DISTRICT COURT NASHVILLE TENNESSEE, 37203.

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

PETITION

1. Name and location of court which entered the judgment of conviction under attack Knox County Criminal Court Division Two Knoxville, Tennessee.

2. Date of judgment of conviction August 24, 1973.

3. Length of sentence (135 Years) Sentencing judge Richard R. Ford.

4. Nature of offense or offenses for which you were convicted: Rape and Crime Against Nature.

5. What was your plea? (Check one)

(a) Not guilty (x)
(b) Guilty ( )
(c) Nolo contendere ( )

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of trial: (Check one)

(a) Jury (x)
(b) Judge only ( )

7. Did you testify at the trial? Yes ( ) No (x)

8. Did you appeal from the judgment of conviction? Yes (x) No ( )

9. If you did appeal, answer the following:

(a) Name of court Court of Criminal Appeals of Tennessee, Knoxville
(b) Result Affirmed Conviction.
(c) Date of result Opinion Filed, Aug. 30, 1974.

If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: Petition for Certiorari was filed with The Supreme Court of Tennessee at Knoxville, September Term 1974 Opinion and Decree was that the petition for certiorari was not well taken, and said petition was denied, March 10, 1975.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes (x) No ( )

11. If your answer to 10 was "yes", give the following information:

(a)(1) Name of court Criminal Court of Knox County, Tennessee Division I

(2) Nature of proceeding Petition for Writ of Habeas Corpus.

(3) Grounds raised Contested the validity of petitioner imprisonment in light of the Constitutional Errors and violations of his Rights as secured to him by the UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION. (Cause No. C-412)

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes (x) No ( )

(5) Result an order was drawn dismissing the Petition.

(6) Date of result May 3rd 1976.

(b) As to any second petition, application or motion give the same information:

(1) Name of court IN THE SUPREME COURT OF TENNESSEE, AT KNOXVILLE.

(2) Nature of proceeding Petition for writ of Mandamus.

(3) Grounds raised That cause No. C-412 Application for Writ of Habeas Corpus had been pending to exceed (90) days and the State of Tennessee had not any Proceeding therein, and ask the Supreme Court to invoke jurisdiction in that matter.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No (x)

(5) Result Writ of Mandamus was Denied.

(6) Date of result December 3rd 1975.

(c) As to any third petition, application or motion, give the same information:

(1) Name of court

(2) Nature of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(5) Result

(6) Date of result

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes ( ) No (x)

(2) Second petition, etc. Yes ( ) No (x)

(3) Third petition, etc. Yes ( ) No ( )

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: NO Appeal was taken There after in cause No. c-412 because petitioner did not know how to go about filing an Appeal, and the counsel that had been appointed did not have time to talk to petitioner much less file an Appeal.

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [where the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: TRIAL COURT: Violated defendants Constitutional Rights by Limiting his Cross-Examination of the Witnesses against him. Supporting FACTS (tell your story *briefly* without citing cases of law): Trial Court ruling that defense counsel could not Cross*-Examine the prosecutrix by asking her about specific statements she made to defense counsel in a pre-trial interview in defense counsel office, the predicate for this ruling was that counsel did not tell the witness that he was counsel for the defendant, but only that he was a lawyer in the case. page 53 of trial transcript states the following: defense counsel Question to the Court. For my own direction Your Honor, what is the authority for such? in other words... THE COURT: The Court has just ruled. defense counsel: For my own direction Your Honor what is there a case on that? THE COURT: THERE IS NOW. TRIAL COURT: RULING VIOLATED DEFENDANTS CONSTITUTIONAL RIGHTS AS SECURED TO HIM BY THE UNITED STATES CONSTITUTION AND THE TENNESSEE CONSTITUTION:

B. Ground two: THE PREJUDICIAL CONDUCT OF THE ASSISTANT ATTORNEYS GENERAL VIOLATED DEFENDANTS UNITED STATES CONSTITUTIONAL RIGHTS: Supporting FACTS (tell your story *briefly* without citing case or law): This assignment aries [sic] as a result of the states attempt ing to put into evidence wholly inadmissible and prejudicial testimony by witness Terri Tankersley as to what she seen between the defendant and her sister, years before in a totally unrelated occurence, the Attorney General ask miss Tankersley if she had ever seen the defendant strike her sister, the defendant objected as to materiality. defense counsel ask that the jury be excused so that the Court and defense counsel could hear the proof the state intended to introduce, the Court sustained the objection to the question as leading and allowed the attorney general to proceed, defense counsel then reiterated for objection as to materiality and the following statements occurred in front of the jury;

GEN. GILL: I Would think the defendants violant nature would be material to this case in light of what the victim has testified to.

MR. WORKMAN: YOUR HONOR....

GEN. GILL: I assume they claim that he's not this kind of a person, and we're trying to show that he is THATS THE MATERIALITY.

MR. WORKMAN: Your HONOR. if I may finish my statement. I don't see any materiality to this case. he's charged in This case with rape and crime against nature.

GEN. EVANS: Are you finished now? I will explain. Your Honor. This young lady explained in detail that one of the reasons that she reacted the way she did was because of this advice she received from this young lady. I think its proper to show why this young lady was given the advice she was.

MR. WORKMAN: Your Honor. I think we're going to get into a long dissertation of the proof of what witness said and what they're going to say and maybe we had ought to have the jury step out; (*Transcript page 113—114)*

Defense Counsel: Then moved the court for a mistrial of statements of the Attorney General and the attempted offer of proof. *B.E. 114.*

The Court then ask the state to offer the proof out of the presence of the jury, and TERRI TANKERSLEY Testified that twice she had seen altercations between the defendant and her sister approximately two years prior to the date of this case. *B. E. 119—120.*

The Court overruled the motion for a mistrial and told the jury to disregard any question as to mistreatment of the witness sister by the defendant.

This petitioner believes as a result of the prejudicial conduct and the attempt of the attorney general to offer this incompetent line of proof. that [sic] his Constitutional Rights to a fair trial as secured to him by the United States Constitution and the Tennessee Constitution. Were Violated.

Certainly, the indication of the question asked by the Attorney General and combined with comments in front of the jury even with the instructions of the court, lift with the jury a bad impression as to the defendants character, had the proof referred to been in any way material to the issue in the lawsuit or perhaps even closer in time to the date of the alleged rape. The attempt of the Attorney General to offer it and then by Comments in front of the jury makes this situation Prejudicial.

C. Ground three: Attorney Generals: Adverse comments relating to Defendants failure to testify. Supporting FACTS (tell your story *briefly* without citing cases or law): Petitioner believes that the comments of the Attorney General were directed at the failure of the defendant to testify in indicating to trial jury that (now) evidently the defendants theory of this case is that we are to believe the minor inconsistencies in the States "PROOF" and of course the states PROOF is what we are considering. The only story we've heard about what happen from 8:15 of the night of March 16th until about four o'clock in the morning of March 17th came from the states Witnesses (Trial Transcript page 263).

The Comments of the Attorney General violated the defendants Fifth and Fourteenth Amendment Rights as secured to him by the United States Constitution and the Tennessee Constitution:

D. Ground four: Trial court judge: Improper charge to trial jury violated defendants United States Constitutional rights Supporting FACTS (tell your story *briefly* without citing cases or law): Charge of trial court: Pages 291—292 of trial transcript reads as follows: (in part)

> The jurors are the exclusive judge of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence you must reconcile them. If you can. Without hastily or rashly concluding that any witness has sworn falsely, (For every witness is presumed to sware [sic] the truth).
>
> You are to draw no inference and you are to place no emphasis whatsoever upon the (fact that the defendant did not testify). As that is his right. The defendant is presumed to be innocent, and that presumption stands in his favor regardless of whether he testifies or not. As the law cast the burden upon the states to prove the defendants guilt beyond a reasonable doubt and this rests upon the state irrispective [sic] of whether or not the defendant testifies.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: C and D grounds of this petition have not been previously presented to any other court (State or Federal) in any petition or motion or application. Because the defendant was not aware that this proscedure [sic] might be a violation of his rights as secured to him by the United States Constitution and the Tennessee Constitution as defendants court appointed counsel had not objected to either coments [sic] of the Attorney General or trial courts instructions to trial jury in the matters set forth in grounds (C and D).

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No (x).

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing None

(b) At arraignment and plea Attorneys Dale C. Workman and Attorney Geoffrey Kressin at 4630 Old Kingston Pike Knoxville Tennessee.

(c) At trial Dale C. Workman and Geoffrey Kressin Attorneys 4630 Old Kingston Pike Knoxville Tennessee.

(d) At sentencing Dale C. Workman and Geoffrey Kressin Attorney 4630 Old Kingston Pike Knoxville Tennessee.

(e) On appeal Dale C. Workman and Geoffrey Kressin Attorneys 4630 Old Kingston Pike Knoxville Tennessee.

(f) In any post-conviction proceeding

(g) On appeal from any adverse ruling in a post-conviction proceeding.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes (x) No ( )

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes (x) No ( )

(a) If so, give name and location of court which imposed sentence to be served in the future: United States District Court Eastern Division at Knoxville Tennessee.

(b) And give date and length of sentence to be served in future: June 14th 1971 5 years parole violation

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes (x) No ( )

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on
(Date)
/s/ Noah H. Lundy
(Signature of Petitioner)

Executed at
(City, County, State)

Signature of Attorney
(if any)

Subscribed and sworn to before me this 1st day of Feb. 1979

/s/ Paul K. Trotler
Notary Public

My Commission Expires 11-5-1980

STATE'S ANSWER TO FEDERAL PETITION FOR WRIT OF HABEAS CORPUS

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CIVIL ACTION FILE No. 79-3081-NA-CV

Noah Harrison Lundy,
Petitioner,

v.

Vinson Thompson, Warden,
Tennessee State Penitentiary
and
The Attorney General For
The State of Tennessee,
Respondents.

ANSWER

I

PRELIMINARY STATEMENT

Pursuant to this Court's order entered on February 15, 1979, and summons served upon respondents on February 20, 1979, the respondents submit the following answer.

This is petition for writ of habeas corpus filed by Noah Harrison Lundy complaining of his confinement under a judgment rendered on August 24, 1973, by the Honorable Richard R. Ford, Judge of the Knox County Criminal Court, Division II, approving the petitioner's convictions of rape and crime against nature and sentence to a term of one hundred and twenty years

and not less than five years nor more than fifteen years in the State Penitentiary, said sentences to be served consecutively. Petitioner's conviction was affirmed by the Court of Criminal Appeals of Tennessee at Knoxville on August 30, 1974, and the petition for writ of certiorari filed with the Tennessee Supreme Court was denied on March 10, 1975. The petitioner sought post-conviction relief in the Knox County Criminal Court on December 5, 1975 and the trial court's memorandum opinion was entered on May 3, 1976.

Exhaustion of State Remedies:

The petitioner has exhausted his available state remedies for the allegations stated in grounds 1 and 2 of his complaint. However, the respondents submit that the petitioner is not entitled to relief based upon the allegations stated in grounds 3 and 4 of his petition as a result of his deliberate by-passing of state remedies in order to litigate these issues before a federal court.

The petitioner deliberately declined to seek appellate review of the prosecuting attorney's remarks during closing argument. Significantly, no objection was made concerning the prosecutor's remarks at trial. Furthermore, the petitioner failed to seek appellate review of the trial court's instruction concerning the presumption that each witness is telling the truth when testifying under oath. Likewise, the petitioner made no objection at trial concerning this instruction.

Transcripts:

The Technical Record and Bill of Exceptions of the petitioner's trial and hearing on his petition for post-conviction relief will be provided upon request. Pertinent portions of the transcripts are submitted with the respondents' answer.

Briefs and Opinions:

The respondents file the following briefs and opinions:

a. petitioner's brief in the Tennessee Supreme Court (petitioner's brief filed with the Court of Criminal Appeals is included within the brief filed with the State Supreme Court);

b. opinion of the Court of Criminal Appeals;

c. petition for State post-conviction relief;

d. memorandum opinion and order dismissing the petition for post-conviction relief.

II

ISSUES PRESENTED FOR REVIEW

A

Whether the trial court's refusal to permit petitioner's counsel to examine the prosecutrix at trial concerning prior statements made to the defense counsel during a pre-trial interview so affected the trial that the ruling denied the petitioner his right to due process of law.

B

Whether the prosecuting attorney's remark that the petitioner was a violent person was so prejudicial that the petitioner's State trial was rendered fundamentally unfair and denied him his right to due process of law.

C

Whether the petitioner may seek habeas corpus review of the State's closing argument where no objection was made at trial and the petitioner did not seek appellate review of the prosecutor's remarks.

D

Whether the petitioner may seek habeas corpus relief from his conviction on the ground that the trial judge improperly instructed the jury where no objection was made to the instruction at trial and the petitioner elected not to seek appellate review of the trial court's instruction.

III

ARGUMENT

A

The Petitioner Was Not Denied Due Process Of Law By The Trial Court's Limitations Placed Upon His Cross-Examination Of The Prosecutrix.

During the petitioner's State trial on charges of rape and crime against nature, petitioner's counsel sought to cross-examine the prosecutrix concerning statements made by her to the defense counsel during a private pre-trial interview. The trial court did not permit the cross-examination questions on the grounds that the defense counsel did not properly identify his role to the prosecutrix. This reason for the trial court's ruling was clearly improper and the Court of Criminal Appeals so held. However, the trial judge did permit the petitioner's defense counsel to cross-examine the prosecutrix upon the same subject matter related by her to the defense counsel during the pre-trial interview. The respondents submit that a review of the jury-out hearing wherein the proffered questions and answers were stated on the record, clearly demonstrates that the petitioner was not prejudiced since the defense could not properly lay a foundation for impeachment through prior inconsistent statements. The prosecutrix essentially denied that she made the statements to the defense counsel or, alternatively, could not remember making the said statements (B.E. 232-236).

The Court of Criminal Appeals overruled this assignment of error and stated:

> We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that the defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming case before questioning a witness.

The respondents submit that the petitioner has failed to demonstrate that the exclusion of this line of examination was a crucial, critical and highly significant factor leading to his conviction. *Anderson* v. *Maggio,* 555 F.2d 447 (5th Cir. 1977). His failure precludes habeas corpus relief. This heavy burden which the petitioner must bear in support of habeas corpus relief reflects the Supreme Court's attitude concerning the granting of habeas corpus relief as stated in *Henderson* v. *Kibbe,* 431 U.S. 145, 97 S.Ct. 1730, 1737, 53 L.Ed.2d 203, 212 (1977) n.13:

> The strong interest in preserving the finality of judgments . . . as well as the interest in orderly trial procedure, must be overcome before collateral relief can be justified. For a collateral attack may be made many years after the conviction when it may be impossible, as a practical result, to conduct a retrial.

This rationale is certainly applicable to the instant case where the petitioner seeks relief from a conviction for an offense occurring over six years ago. Although the trial court's ruling was based upon an erroneous ground, the petitioner's defense counsel should have been aware of the pitfalls by his interviewing the prosecutrix in a private pre-trial setting. *See* ABA Standards, Defense Function § 4.3(d) in Commentary.

B

The Prosecutor's Remarks Did Not Deny The Petitioner His Right To Due Process Of Law.

The petitioner complains of remarks made by the prosecuting attorneys as set forth on pages 113 and 119-120 of the Bill of Exceptions. The respondents point out that the statements by prosecuting attorneys on pages 119-120 of the Bill of Exceptions were made out of the presence of the jury and could not have affected the petitioner's conviction.

The sole remaining remark by the prosecuting attorney made before the jury is as follows:

> Mr. Workman (defense counsel):
>
> Your Honor, I still don't see the materiality of this as to . . . .
>
> Gen. Gill (prosecutor):
>
> I would think the defendant's violent nature would be material to this case in the light of what the victim has testified to. (B.E: 113).

The respondents contend that the concededly improper statement by the prosecutor in the presence of the jury does not present a claim of constitutional magnitude cognizable in federal habeas corpus proceedings unless the petitioner proves that the statement was so prejudicial that his trial was rendered fundamentally unfair within the meaning of the due process clause. *Cf., Alvarez* v. *Estelle,* 531 F.2d 1319 (5th Cir. 1976), *cert. denied,* 429 U.S. 1044, 97 S.Ct. 748. The above quoted remark was isolated and cannot have been said to so affected the fact-finding process that it caused the jury to ignore the evidence and to convict and sentence the petitioner solely on the basis of this singular remark.

C

The Petitioner Was Not Prejudiced By The Prosecutor's Closing Argument.

The petitioner seeks collateral relief from his conviction because of the prosecuting attorney's statements during his closing rebuttal argument. The respondents submit that the petitioner deliberately by-passed his available State remedies by failing to raise this issue on direct review of his conviction and in his State petition for post-conviction relief and, therefore, is precluded from seeking habeas corpus relief. *Fay* v. *Noia,* 372 U.S. 391, 83 S.CT. 822, 9 L.Ed.2d 837 (1963). The petitioner did not object to the prosecutor's remarks at trial and no error was alleged on review of his conviction. Absent a showing of cause and prejudice the petitioner is not entitled to habeas corpus relief. *Francis* v. *Henderson,* 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976); *Wainwright* v. *Sykes,* 433 U.S. 72, 97 S.CT. 2497, 53 L.Ed.2d 594 (1977).

A review of the State's rebuttal argument clearly indicates that the prosecutor was not trying to comment on the defendant's failure to testify but merely was pointing out that the State's evidence was uncontradicted by the defendant, which argument is permissible. *Edwards* v. *Patterson,* 249 F.Supp. 311 (D.Colo. 1965); *Heffelfinger* v. *Thompson,* 444 F.Supp. 309 (E.D.Tenn. 1977).

Matters pertaining to the propriety of a prosecutor's argument must be asserted on appeal and do not constitute grounds for habeas corpus relief unless they rise to the level of a denial of the petitioner's constitutional rights. *Keener* v. *Tennessee,* 281 F.Supp. 964 (E.D.Tenn. 1968). The petitioner has simply failed to meet his burden.

D

The Trial Court's Instruction To The Jury Do Not Deprive The Petitioner Of Due Process Of Law.

The petitioner failed to object to the trial court's instruction to the jury concerning the presumption that witnesses are presumed to be telling the truth. No error was assigned on review of his conviction in the State courts and, therefore, the respondents submit that the petitioner is precluded from seeking habeas corpus relief on an issue where the petitioner deliberately by-passed available State remedies. (See discussion of authorities in sub-paragraph C, above.)

The respondents further contend that the petitioner has failed to prove that the instruction, given in accordance with the State law, so misstated the law that the entire trial resulted in a conviction which violated the petitioner's due process of law.

> Before a Federal Court may overturn a conviction resulting from a State trial in which this instruction was used, it must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned", but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment.
>
> . . .
>
> The question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. *Cupp* v. *Naughten*, 414 U.S. 141, 146-147, 94 S.Ct. 396, 400, 38 L. Ed.2d 368, 373-374 (1973).

The respondents submit that the petitioner has not only failed to prove that the challenged instruction was erroneous, as a matter of law, but more importantly, that the instruction affected the fact-finding process.

IV

CONCLUSION

For these reasons, the respondents respectfully submit that the petition for writ of habeas corpus should be denied and the case dismissed.

Respectfully submitted,

JOHN ZIMMERMANN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3231

(Certificate Of Service Deleted)

ORDER AND MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 79-3081-NA-CV

Noah Harrison Lundy

vs.

Vinson Thompson, Warden, Tennessee State Penitentiary and the Attorney General for the State of Tennessee

ORDER

In accordance with the Memorandum contemporaneously filed, a Writ of Habeas Corpus shall be granted and the defendant discharged from custody unless within ninety (90) days the State of Tennessee initiates steps to try defendant anew.

L. CLURE MORTON

MEMORANDUM

Petitioner Noah Harrison Lundy seeks relief pursuant to 28 U.S.C. § 2254 from a judgment of conviction of rape and crime against nature. He has asserted four grounds for relief:

1. Limiting the cross examination of a witness (prosecutrix).

2. The prejudicial conduct of prosecuting attorney in making certain remarks in front of the jury.

3. That the prosecuting attorney commented on the failure of the defendant to testify.

4. The trial court gave an improper charge to the jury that every witness is presumed to swear the truth.

The petitioner asserts that grounds three and four have not been previously presented to any court, state or federal. The records of the state cause reflect that grounds one and two were presented to the highest court in Tennessee having jurisdiction and decided adversely to petitioner. The records further reveal that grounds three and four were not so presented.

Since grounds three and four have not been presented to the state court there has been no exhaustion of remedies as to these two. Thus this court will not consider them in the constitutional framework. However, in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally.

Prosecutorial misconduct and the deprivation of a meaningful cross examination of one of two eye-witnesses (the prosecutrix) was squarely presented in the court proceedings. The Court of Criminal Appeals of Tennessee responded in the following language:

> Error is assigned upon the trial court's ruling that defense counsel could not cross-examine the victim by asking her about specific statements that she supposedly made to defense counsel in a pre-trial interview in defense counsel's office. The predicate for this ruling was the fact that defense counsel did not tell the witness that he was counsel for the defendant, but only that he was a lawyer in the case. The final assignment of error is related to this one, in that it accuses State's counsel of making prejudicial remarks about defense counsel during argument before the jury about the admissibility of these questions.

> We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming case before questioning a witness. He apparently made no misrepresentation, and was apparently seeking the truth. State's counsel was unduly critical of defense counsel in indicating before the jury that State's counsel should have been present at the interview, etc., but we hold this error to be harmless in the context of this case.

To properly address the two grounds asserted by petitioner it is necessary to refer to a substantial amount of testimony. Thus pages 42 through 55 and pages 88 and 113 of the evidence, the argument of the Attorney General to the jury, pages 262 through 268, and the charge of the court on page 291 are made an appendix to this memorandum.

An analysis of the testimony reflects improper conduct of the Attorney General as follows:

(1) On pages 43 and 44 the state's attorney represented to the jury that defense counsel was guilty of illegal and unethical conduct on interviewing the prosecutrix when he knew or should have known that his representation was false.

(2) On page 44 the state's attorney testified to the jury that the prosecutrix was telling the truth. Clearly, this was reprehensible conduct in that the attorney placed his own reputation and the power of the state as vouching for the truthfulness of the testimony of this witness. Neither the attorney nor the State of Tennessee were subject to cross examination. The statement in evidence by General Evans was, "She's telling the truth on the stand . . . ."

(3) The Attorney General stated in the presence of the jury his idea of the proper method for a defense counsel to interview witnesses.

(4) The Attorney General clearly misrepresented the law to the court in connection with the interviewing of the government's witnesses.

(5) The Attorney General represented to the court that the prosecutrix and victim of an alleged criminal event has the right to be represented by counsel and for an attorney general of the State of Tennessee to be present when the witness is interviewed by defense counsel. This is, of course, ridiculous.

(6) The Attorney General represented to the court that because defense counsel interviewed the prosecutrix without an attorney or the state's attorney present, the conduct of defense counsel was inexcusable. This is less than the conduct required of an attorney general charged with the equal treatment of all citizens.

(7) The Attorney General denied an intention to file a grievance with the "Bar Association" because of the aforementioned alleged unethical conduct. The implication that such a grievance would be valid constitutes an effort to browbeat defendant's counsel.

(8) Through the objections of the Attorney General, which had no legal basis, the court was induced to deprive defendant of the right to effectively cross examine the victim, possibly the most important witness against defendant. The objection and ruling were that the witness could not be examined as to previously conflicting statements prefaced by, "Did not you tell me on [a prior] occasion . . . ." As stated by the appellate court in this cause, the ruling was erroneous. An attorney for the State of Tennessee represents that he has sufficient knowledge to properly prosecute cases without infringing the Sixth Amendment rights of defendants. If this prosecutor had such knowledge, it was not evidenced in this cause.

(9) The Attorney General stated in the presence of the jury, "I would think the defendant's violent nature would be material in this case . . . ." Once again the prosecuting attorney placed his personal testimony before the jury. By this statement he indicated to the jury that the State of Tennessee vouched for such a fact.

(10) In the final summation by the Attorney General he used the word "I" innumerable times. He continuously testified and added his personal evaluations to the State's proof. Some examples are:

(a) I cannot imagine in my own mind a worse crime being committed, a more personally humiliating crime being committed.

(b) I can't think of a more grave or upsetting crime than the ones we've ves [sic] heard here for the last two days.

(c) The only story we've heard about what happened from 8:15 on the night of March 16th until about 4:00 in the morning of March 17th *came from the State's witnesses.* (Emphasis supplied)

(d) I don't think it's important, but . . . .

(e) Now, *I, like General Gill, could not believe the words* I was hearing back when we started this case . . . . (emphasis supplied)

(f) Well, I think it's pretty important to her.

(g) I don't think she'll ever forget what she went through that night out there.

(h) . . . and the first question I asked that lady when I talked to her was why she got in the car, and she thought they were in the neighborhood, and it was raining, and she wanted to get a ride home. She's about as lazy as I am, I guess.

The very minimum interpretation of this statement to the jury is that the Attorney General was testifying to a conversation which occurred in his first interview with the prosecutrix in his office. In addition he was giving testimony as to the reason for the action of the prosecutrix in entering the defendant's car, i.e., laziness.

(i) On the other hand, *if you think as I do,* and I've never wanted to be on a jury more in a case *I've tried,* that this is one of the most despicable crime *I have ever heard* testimony presented in six years of being in prosecution . . . . (emphasis supplied)

. . . and I don't mean ten years, and I don't mean twenty years, and I don't even mean ninety-nine years. I mean forever. If you agree with me that it is despicable as I feel it is, I want you to set a term that . . . .

In addition to the lack of opportunity to cross-examine, the foregoing testimony of the Attorney General was prejudicial in that he made a factual comparison of testimony in similar cases based on his personal experience as a representative of the great State of Tennessee.

(j) I don't think there's anything unreasonable about a term of years that will make sure he spends the rest of his life in the penitentiary, and that's a term way over the standard fifty or sixty or seventy years for rape.

In addition to advising the jury of his personal opinion (not subject to cross-examination and a direct violation of ethical standards), the Attorney General represented that there was a standard term of incarceration on conviction for rape of from fifty to seventy years. Any first-year law student would recognize this statement as being a deliberate falsehood. Even though the court instructed the jury there was no standard, the

prosecuting attorney had placed before the jury the thought that some kind of measuring stick did in fact exist.

The above related items were followed by the charge of the court which contained the following:

> The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, *for every witness is presumed to swear the truth.*" (emphasis supplied)

Without determining the legality of the above charge (*See generally,* Cupp v. Naughten, 414 U.S. 141 (1973)), since this question has not been presented to the courts of the State of Tennessee, and assuming as we must that the jurors followed the law as given by the court, the jurors were instructed that they must presume that the testimony given by the victim was true. The jury had no opportunity to determine whether the witness had made a conflicting statement to the defense attorney prior to trial. This when coupled with the personal testimony of the Attorney General, both during the presentation of the State's case and during argument, constitutes a clear violation of defendant's right to a fair trial. Also, subject to the question of exhaustion of state remedies, where there is added to the trial atmosphere the comment of the Attorney General that the only story presented to the jury was by the state's witnesses there is such mixture of violations that one cannot be separated from and considered independently of the others.

Aside from addressing the illegal restriction on defense counsel of the cross examination of a key state witness, the state court addressed the remaining issues in the following language: "We have carefully examined all assignments of error. We affirm the convictions."

This court is aware that there is sufficient evidence, if believed by the jury, to sustain the conviction of the petitioner for this terrible crime. However, that evidence is overwhelming only if the testimony of the prosecutrix (victim) is likewise believed. Under the charge as given, the limitation of cross examination of the victim, and the flagrant prosecutorial misconduct this court is compelled to find that petitioner did not receive a fair trial, his Sixth Amendment rights were violated and the jury poisoned by the prosecutorial misconduct.

See Davis v. *Alaska,* 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed. 2d 347 (1974). *Cf. Donnelly* v. *De Christoforo,* 416 U.S. 637, 644, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). (Prosecutorial impropriety did not amount to denial of fair trial where trial judge "took special pains" to correct any misimpression of jury.) *See generally, United States ex rel. Fournier* v. *Pinto,* 408 F.2d 539 (3rd Cir. 1969).

The Writ shall be granted and the defendant discharged from custody unless within ninety (90) days the State of Tennessee initiates steps to grant defendant a new trial.

L. CLURE MORTON
CHIEF JUDGE

PER CURIAM OPINION OF THE SIXTH CIRCUIT COURT OF APPEALS

No. 79-1280

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Noah Harrison Lundy,
Petitioner-Appellee

v.

James Rose, Warden, and the Attorney General of Tennessee,
Respondents-Appellants

ORDER

(Filed June 27, 1980)

Before: CELEBREZZE, ENGEL and MARTIN, Circuit Judges

The respondent appeals from a judgment of the district court granting a writ of habeas corpus discharging Noah Harrison Lundy from custody unless he is retried within ninety days on state charges of rape and crime against nature.

While Lundy's petition stated four grounds for relief, the district judge ruled only on the first two: (1) that Lundy's attorney was prejudicially limited in his cross-examination of the prosecutrix in violation of the petitioner's right of confrontation; and (2) that the prosecuting attorney had violated Lundy's right to due process under the Fourteenth Amendment by improper argument and comment in the presence of the jury. The district judge held that Lundy had not exhausted his state remedies on the remaining claims that the prosecutor had imper-

missibly commented upon the defendant's failure to testify and that the trial court improperly instructed the jury.

The state in its brief asks this circuit to adopt what it characterizes as a rule in two other circuits requiring district courts to dismiss all petitions for writs of habeas corpus where the petitions assert claims which the petitioner has not exhausted in the state court system. *See Galertieri* v. *Wainwright,* 582 F.2d 348 (5th Cir. 1978) and *Gonzales* v. *Stone,* 546 F.2d 807 (9th Cir. 1976).

Such a rule has not found favor in the Sixth Circuit and this court declines to adopt it in the present case.

With respect to the first and second grounds for relief, the court, upon consideration of the entire record, concludes that District Judge L. Clure Morton, in an opinion dated March 21, 1979, properly found, after examining the state court proceedings, that petitioner's constitutional rights had been seriously impaired by the improper limitation of his counsel's cross-examination of the prosecutrix and by the prosecutorial misconduct. The state's argument that any constitutional errors are insulated from review by habeas corpus by the cause and prejudice rule of *Wainwright* v. *Sykes,* 433 U.S. 72 (1977), is without merit, it appearing that in all events the state courts of Tennessee did not apply any Tennessee state contemporaneous objection rule with respect to such claims, but had proceeded to consider the same on the merits. Accordingly,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

John A. Hehman
Clerk

ORDER

(Filed Sept. 4, 1980)

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the respondent-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

John A. Hehman
Clerk

RECEIVED
DEC 20
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-846

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JIM ROSE, WARDEN

Appellant - Petitioner

-vs-

NOAH HARRISON LUNDY

Appellee - Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

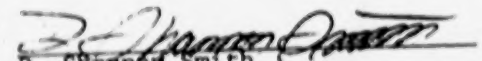
D. Shannon Smith
Attorney for Appellee-Respondent
201 Second National Building
330 Main Street
Cincinnati, Ohio 45202
(513) 651-4130

GUSTIN AND LAWRENCE
ATTORNEYS AT LAW
201 SECOND NATIONAL BUILDING
CINCINNATI, OHIO 45202
(513) 651-4130

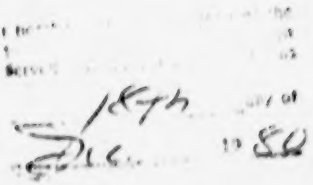
MOTION

Now comes Noah Harrison Lundy, Respondent, by and through counsel appointed for him by the United States Court of Appeals for the Sixth Circuit, and moves the Court for leave to proceed in forma pauperis. Respondent has proceeded in forma pauperis in the United States Court of Appeals for the Sixth Circuit and in the United States District Court, Middle District of Tennessee, Nashville Division. Counsel was appointed pursuant to 18 U.S.C. 3006 A.

GUSTIN & LAWRENCE CO., L.P.A.

BY: 

D. Shannon Smith
Attorney for Appellee-Respondent
201 Second National Building
830 Main Street
Cincinnati, Ohio 45202
(513) 651-4130



NO. 80-846

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JIM ROSE, WARDEN

Appellant-Petitioner,

vs.

NOAH HARRISON LUNDY

Appellee-Respondent.

RECEIVED
DEC 20 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

D. SHANNON SMITH
ATTORNEY FOR APPELLEE-RESPONDENT
201 Second National Building
830 Main Street
Cincinnati, Ohio 45202
(513) 651-4130

GUSTIN AND LAWRENCE
ATTORNEYS AT LAW
[illegible]

QUESTIONS PRESENTED FOR REVIEW

1. Whether a petition for relief under 28 U.S.C. 2254 should be dismissed, without prejudice, where the petition presents several claims for relief some of which have satisfied the exhaustion requirements of 28 U.S.C. 2254 (b), but where one or more of the claims have not been presented to the state courts, thereby failing to satisfy the exhaustion requirements.

2. Whether habeas corpus was properly granted on the grounds of prosecutorial misconduct.

3. Whether habeas corpus relief was granted on the basis of an improper jury instruction.

4. Whether this case should be remanded to the district court which granted habeas corpus relief without considering the entire State trial transcript and where the petitioner requested such relief before the Court of Appeals.

5. Whether the respondent's right of confrontation was abridged when the State Trial Court limited his cross-examination of the State's main witness concerning her prior statements to defense counsel.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Table of Authorities	ii
Opinions Below	1
Grounds on which Jurisdiction is Invoked	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Granting the Petition	7
Conclusion	12
Appendix	A-1

TABLE OF AUTHORITIES

Cases Cited

Alford v. U.S., 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624	11
Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255	11
Berger v. California, 393 U.S. 314, 89 S. Ct. 540, 21 L. Ed. 2d 508	11
Brader v. 30th Judicial Circuit, 410 U.S. 484, 93 S. Ct. 1123, 35 L. Ed. 2d 443	8
Brookhart v. Janis, 384 U.S. 1, 86 S. Ct. 1245, 16 L. Ed 2d 314	11
Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297	11
Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 374	11
Gordon v. U.S., 344 U.S. 414, 73 S. Ct. 369, 97 L. Ed. 447	11
Johnson v. U.S.D.C., 519 Fed. 2d 738 (8th Cir.)	7
Manensi v. Stubbs, 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293	11
Parker v. Gladdon, 385 U.S. 363, 87 S. Ct. 468, 17 L. Ed. 2d 420	11
Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1063, 13 L. Ed. 2d 923	11
Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956	11
Tyler v. Swenson, 483 Fed. 2d 611 (8th Cir.)	7

GAVIN AND LAWRENCE
ATTORNEYS AT LAW

Page

U.S. ex rel Boyance v. Myers, 372 Fed. 2d 111 (3rd Cir.)..... 8

U.S. v. McMann, 394 Fed. 2d 402 (2nd Cir.)..... 8

OPINIONS BELOW

The unreported and reported opinions below are presented in the Petition for Writ of Certiorari of Petitioner.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The grounds on which jurisdiction is invoked are presented in the Petition for Writ of Certiorari of Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Petition for Writ of Certiorari of Petitioner.

STATEMENT OF THE CASE

Noah Lundy was convicted by a jury, contrary to his pleas, of rape and crime against nature and was sentenced to terms of one hundred and twenty (120) years and fifteen (15) years, respectively, in the Tennessee State Penitentiary. Lundy's convictions were affirmed by the Tennessee Court of Criminal Appeals on August 30, 1974, and the Tennessee Supreme Court denied review on March 10, 1975. Noah Lundy then petitioned the Knox County Criminal Court, Tennessee, for a writ of habeas corpus which was denied, after an evidentiary hearing, on May 3, 1976.

Lundy then petitioned the United States District Court for the Middle District of Tennessee, Nashville Division, for a writ of habeas corpus under the provisions of 28 U.S.C. 2254 and alleged four grounds for relief:

(1) that he was denied his right of confrontation during cross-examination of the prosecutrix;

(2) that he was denied his right to a fair trial because of a prejudicial remark made by the prosecuting attorney to the jury to the effect that Lundy had a violent character;

(3) that he was deprived of his right to a fair trial when the prosecuting attorney commented, during closing arguments, that the only proof before the jury was from the

GASTON AND LAWRENCE
ATTORNEYS AT LAW
[illegible]

state's witnesses and was uncontradicted and rebutted; and,

(4) that the trial judge improperly instructed the jury that every witness is presumed to swear the truth.

The district court granted habeas corpus relief to Noah Lundy on March 21, 1979, which decision was affirmed by the United States Court of Appeals for the Sixth Circuit.

During the course of the Trial, Lundy's counsel attempted to cross-examine the alleged victim of the crime concerning a conversation he had with her in his office prior to trial. The Assistant Attorney General objected to use of that conversation, stating in front of the jury that defense counsel had not informed the alleged victim who he was, that his actions were improper, that the alleged victim should have been advised she had a right to counsel:

Q So you had had intercourse with boys during 1973, is that true or not true?

A Just Aaron Miller.

Q And you had intercourse with Danny Nipper, a boy by the name of Danny Nipper, had you not?

A Not in the year '73. That was the year before in '72.

Q I believe you had intercourse with Aaron Miller ten to twenty times during this period, had you not?

A I don't remember how many times.

Q That's what you told me previously.

A I don't remember.

GEN. EVANS: Object to what he told her previously.

THE COURT: Very well. I sustain the objection. You may ask her questions, Mr. Workman; but, ladies and gentlemen of the jury, you will not consider for any purpose the comment of counsel. The duty of counsel is to ask the questions and let the witness answer them. All right.

GUSTIN AND LAWRENCE
ATTORNEYS AT LAW
[illegible]

Q Miss Murphy, did you or did you not tell me on an occasion when I talked with you that you had had intercourse with Aaron Miller ten to twenty times?

A I don't remember.

GEN. EVANS: Your Honor, I want to object to that, because I consider the conversation he had with her--this young lady--completely improper. He didn't inform her who he was--

MR. WORKMAN: What?

GEN. EVANS: ... he didn't inform her who he was, he didn't tell her she had a right to have counsel present, he didn't do anything. He got her down there ....

MR. WORKMAN: (Inaudible)

GEN. EVANS: She's telling the truth on the stand--and he got her down there, and now he's trying to make use of that conversation, which was completely improper, and I object to any reference to that conversation or any attempt to use it to impeach on cross-examination.

MR. WORKMAN: If I may, Your Honor, I don't like the inference that counsel got her down there and tried to twist her arm. As the Court knows, counsel in all cases try to contact the witnesses and find out what they know, and that's what I did in this case. It happens in 99 percent of the cases in this Court.

GEN. EVANS: In most cases, Your Honor, that I'm familiar with, I believe the proper thing to do is that counsel inform the people they're talking to, the people who they represent, which does not happen in this incident. This young lady did not know who

GUSTIN AND LAWRENCE
ATTORNEYS AT LAW
[illegible]

she was talking to at the time she was talking to him.

MR. WORKMAN: During the course of my talking to her, I got a phone call from another....

THE COURT: Excuse me, excuse me, gentlemen. Would counsel approach the bench here a moment.

The Assistant Attorney General further accused the defense attorney of unethical conduct and threatened to make his conduct an issue in the case. This entire conversation took place in the presence of, and in fact included, the alleged victim. The Court sustained the objection, and did not permit cross-examination on what the witness had told the defense attorney during the conversation, as he did not identify himself as representing Lundy prior to asking her questions. When asked for authority for the ruling, the Court indicated none other than itself.

Also, during the exchange before the Jury, the Assistant Attorney General made a comment bolstering the witnesses' credibility. He later made a statement about Lundy's "violent nature":

Q Tell the jury whether or not you ever witnessed any difficulties between your sister, while she was dating the defendant, and the defendant?

MR. WORKMAN: Your Honor, I still don't see the materiality of this as to....

GEN. GILL: I would think the defendant's violent nature would be material to this case in the light of what the victim has testified to.

MR. WORKMAN: Your Honor....

GEN. GILL: I assume they claim that he's not this kind of a person, and we're trying to show that he is. That's the materiality.

During closing argument, the Assistant Attorney General

testified to the Jury concerning the contents of a conversation he had with the alleged victim prior to the trial:

> "And the first question I asked that young lady when I talked to her was why she got in the car, and she thought they were in the neighborhood, and it was raining, and she wanted to get a ride home. She's about as lazy as I am I guess."

Also, during closing arguments the prosecuting attorney, in rebutting the defense counsel's summation, made the following remarks:

> Now, evidently, the defendant's theory of this case is that we are to believe the minor inconsistencies in the State's proof, and, of course, the State's proof is what we are considering. The only story we've heard about what happened from 8:15 of the night of March 16th until about 4:00 in the morning of March 17th came from the State's witnesses. And we're suppose (sic) to think it's important whether or not he was asleep when we got there, whether he was covered or not covered, when the clothes were taken off, whether she was or was not held on the bed, whether or not she was forced with his hands or just suggested that she drink whiskey, and whether or not at one time at one point she had her hands somewhere on his back.

The trial judge instructed the jury as follows which instruction is the subject of Lundy's fourth claim for habeas corpus relief:

> The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, for every witness is presumed to swear the truth.

The district court found that grounds 1 and 2 of Lundy's petition had been fairly presented to the Tennessee Supreme Court but that Lundy had not exhausted his available state remedies with respect to grounds 3 and 4 of his petition. The district court granted habeas corpus relief to Lundy on March 21, 1979 and ordered the State of Tennessee to re-try Lundy within ninety (90) days or to release him from custody. The state appealed to the United States Court of Appeals for the Sixth

GASKIN AND LAWRENCE
ATTORNEYS AT LAW

Circuit which Court affirmed the judgment of the district court on June 27, 1980. The petitioner's petition for rehearing and suggestion en banc was denied on September 4, 1980.

REASONS FOR DENYING THE PETITION

I

Claims in a Petition for Writ of Habeas Corpus which meet the exhaustion requirement can be considered by the Court, even though other claims in the Petition do not meet the exhaustion requirement. Johnson v. U.S.D.C., 519 Fed. 2d 738 (8th Cir.), Tyler v. Swenson, 483 Fed. 2d 611 (8th Cir.).

Lundy's Petition for Writ of Habeas Corpus contained four grounds for relief:

1). Trial Court violated defendants' constitutional rights by limiting his cross-examination of the witnesses against him.

2). The prejudicial conduct of the Assistant Attorney General violated defendants' United States Constitutional rights.

3). Attorney Generals adverse comments relating to defendants failure to testify.

4). Trial Court Judge's improper charge to Trial jury violated defendants' constitutional rights.

The District Court found that grounds three and four had not been presented to the state court and stated that it would not consider them in the constitutional framework, but might refer to them collaterally.

Petitioner argues that because all of Lundy's claims did not meet the exhaustion requirement, even the claims properly pursued should have been dismissed. Courts have addressed this question and resolved the conflict between the exhaustion requirement and a remedy for violation of constitutional rights:

> We recognize . . . the desirability, where circumstances permit, of including all grounds for habeas in a single petition. But we think this does not outweigh the legitimate interest of a prisoner in obtaining prompt

GUSTIN AND LAWRENCE
ATTORNEYS AT LAW
[illegible]
[illegible]

> federal consideration of an adequate and properly asserted ground for relief that has been urged unsuccessfully before the state courts. U.S. ex rel Boyance v. Myers, 372 Fed. 2d 111 (3rd Cir.)
>
> However, where the unexhausted claims are either unrelated to the principal exhausted claim or frivolous, the desirability of including all grounds for habeas corpus in a single petition does not outweigh the interests of a prisoner in obtaining prompt federal consideration of exhausted claims. U.S. v. McMann, 394 Fed. 2d 402 (2nd Cir.)

The issue has perhaps been best put into perspective by the Court in Brader v. 30th Judicial Circuit, 410 U.S. 484, 93 S. Ct. 1123, 35 L. Ed. 2d 443:

> The doctrine of exhaustion of state remedies as a pre-requisite to federal habeas corpus action is a judicially crafted instrument which reflects a useful balance between important interests of federalism and the need to preserve the Writ of Habeas Corpus as a swift and imperative remedy in all cases of illegal restraint or confinement. This doctrine cannot be used as a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes which underlie the doctrine and which called it into existence.

To hold that the District Court could not consider the exhausted claims which addressed Lundy's deprival of a fair trial because two separate claims had not been exhausted would indeed be an indiscriminate firing of the blunderbuss.

II

The prejudicial conduct of the prosecution was challenged at the State Trial Court and State Appellate Court levels. Each example referred to in the opinion of the District Court granting the Writ of Habeas Corpus may not have been presented in Lundy's brief in the State Courts, but the issue was raised and exhausted.

The issue is not how many instances of misconduct existed and how many were objected to, but whether or not there was prosecutorial misconduct. This issue was raised and the

GUSTIN AND LAWRENCE
ATTORNEYS AT LAW
CINCINNATI, OHIO

prosecutorial misconduct was established and recognized by the Court of Criminal Appeals of Tennessee. The District Court in considering this claim for relief had a duty to review the record closely to find if Lundy's claim was supported by the record. The Court was considering a petition filed pro se by one not trained in the law on preprinted form, which advises Petitioner to "tell your story briefly without citing cases or law". The Court discharged this duty by referring to "a substantial amount of testimony".

Upon review of the record, it becomes clear that the States Attorneys' comments to the Jury concerning Defense Counsel's conduct in interviewing the witness plus his repeated testimony throughout the examination of witnesses and closing argument and his expression of his personal views of the Defendant's nature.

III

The District Court did not grant relief on the ground of an erroneous jury instruction.

In the memorandum accompanying the order granting the Writ of Habeas Corpus, the District Court stated it would not consider the two unexhausted claims in the constitutional framework (i.e., as a basis for granting the Writ), but might refer to them collaterally in assessing the atmosphere of the cause taken as a whole. (Appendix C)

In reviewing the Court's Memorandum it is clear that the Court considered the Trial Court's charge, not for its legality, but for the effect it had on the jury's evaluation of the testimony of the alleged victim in the light of lack of opportunity to cross-examine her on her previous statements to defense counsel. In fact, the District Court did not even find the charge that every witness is presumed to swear the truth erroneous.

GUSTIN AND LAWRENCE
ATTORNEYS AT LAW
[illegible]

Also, the effect of the Jury Instruction, correct or incorrect, must be weighed in reference to the voluminous testimony by the Assistant Attorney General, not subject to any cross-examination, referred to by the District Court.

IV

Petitioner raised Five Questions for review in the Court of Appeals. None of them were addressed to the question of an incomplete record in the District Court, nor did Petitioner in its brief ask for the Court of Appeals to remand the case to the District Court for review of the entire record. This question is presented for the first time in the Petition for Writ of Certiorari and ought not to be considered.

The Petitioner having filed only a partial transcript, having failed to request an evidentiary hearing, having failed to assign the question of the record as error, cannot now be heard to complain of an incomplete transcript.

V

Lundy was deprived of his Sixth Amendment Right of Confrontation by the refusal of the Court to permit his attorney to cross-examine the state's chief witness concerning a conversation with the attorney prior to trial. The Court's reason was that the attorney did not identify himself as the representative of the Defendant prior to the conversation. This was certainly no basis in law for denial of cross-examination on the items revealed in the conversation.

Both this issue and that of prosecutorial misconduct was presented to the Court of Criminal Appeals which found error on both counts but found it not to be prejudicial.

The denial of reasonable latitude in cross-examination is prejudicial error and it is not necessary to show that the cross-examination, if preserved, would necessarily have brought

GASTON AND LAWRENCE
ATTORNEYS AT LAW
[illegible]
[illegible]
(918 [illegible]

out facts tending to discredit the testimony in chief. Alford v. U.S., 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624.

Here the witness whose cross-examination was erroneously restricted by the Trial Court's ruling was the alleged victim of the offenses and the state's chief witness. Had her credibility been successfully challenged on the issue of voluntariness, the outcome of the case might have differed greatly. "Where a criminal case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny. Gordon v. U.S., 344 U.S. 414, 73 S. Ct. 369, 97 L. Ed. 447.

The right to confront witnesses is a Trial right, and includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness. Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255; Manensi v. Stubbs, 408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed 2d 293; Berger v. California, 393 U.S. 314, 89 S. Ct. 540, 21 L. Ed. 2d 508.

The jury in this case was denied the opportunity to hear the witness cross-examined on her prior statement and to observe her demeanor when confronted with those statements.

The right of confrontation and cross-examination is a fundamental requirement of a constitutionally fair Trial, and denial of that right is a constitutional error so great that no amount of showing of want of prejudice can cure. Pointer v. Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed 2d 923; Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 374; Parker v. Gladdon, 385 U.S. 363, 87 S. Ct. 468, 17 L.Ed. 2d 420; Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. ed. 2d 297; Brookhart v. Janis, 384 U.S. 1. 86 S. Ct. 1245, 16 L. Ed. 2d 314; Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956.

GASTON AND LAWRENCE
ATTORNEYS AT LAW

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

GUSTIN & LAWRENCE CO., L.P.A.

BY: D. Shannon Smith

D. Shannon Smith
Attorney for Appellee-Respondent
201 Second National Building
830 Main Street
Cincinnati, Ohio 45202
(513) 651-4130

[illegible] copy of the [illegible] brief on [illegible] this

18th day of

Dec. 1980

GUSTIN AND LAWRENCE
ATTORNEYS AT LAW
[illegible]
CINCINNATI, OHIO 45202
(513) 651-4130

APPENDIX CONTENTS

A. Memorandum Opinion of the United States Court of Appeals for the Sixth Circuit, June 27, 1980

B. Memorandum Opinion of the United States Court of Appeals for the Sixth Circuit, September 4, 1980

C. Memorandum Opinion and Order of the United States District Court, Middle District, Tennessee, March 21, 1979

D. Opinion of the Tennessee Court of Criminal Appeals, August 30, 1974

E. Opinion of the Tennessee Supreme Court, March 10, 1975

CASPER AND LAWRENCE

79-1280

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUN 27 1980
JOHN P. HEHMAN, Clerk

NOAH HARRISON LUNDY,

Petitioner-Appellee

V.

JAMES ROSE, Warden, and the
Attorney General of Tennessee,

Respondents-Appellants

O R D E R

Before: CELEBREZZE, ENGEL and MARTIN, Circuit Judges

The respondent appeals from a judgment of the district court granting a writ of habeas corpus discharging Noah Harrison Lundy from custody unless he is retried within ninety days on state charges of rape and crime against nature.

While Lundy's petition stated four grounds for relief, the district judge ruled only on the first two: (1) that Lundy's attorney was prejudicially limited in his cross-examination of the prosecutrix in violation of the petitioner's right of confrontation; and (2) that the prosecuting attorney had violated Lundy's right to due process under the Fourteenth Amendment by improper argument and comment in the presence of the jury. The district judge held that Lundy had not exhausted his state remedies on the remaining claims that the prosecutor had impermissibly commented upon the defendant's failure to testify and that the trial court improperly instructed the jury.

The state in its brief asks this circuit to adopt what it characterizes as a rule in two other circuits requiring district courts to dismiss all petitions for writs of habeas corpus where the petitions assert claims which the petitioner has not exhausted in the state court system. See Galertieri v. Wainwright,

582 F.2d 348 (5th Cir. 1978) and Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976).

Such a rule has not found favor in the Sixth Circuit and this court declines to adopt it in the present case.

With respect to the first and second grounds for relief, the court, upon consideration of the entire record, concludes that District Judge L. Clure Morton, in an opinion dated March 21, 1979, properly found, after examining the state court proceedings, that petitioner's constitutional rights had been seriously impaired by the improper limitation of his counsel's cross-examination of the prosecutrix and by the prosecutorial misconduct. The state's argument that any constitutional errors are insulated from review by habeas corpus by the cause and prejudice rule of Wainwright v. Sykes, 433 U.S. 72 (1977), is without merit, it appearing that in all events the state courts of Tennessee did not apply any Tennessee state contemporaneous objection rule with respect to such claims, but had proceeded to consider the same on the merits. Accordingly,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman
Clerk

ISSUED AS MANDATE: SEPTEMBER 12, 1980
COSTS: NONE
A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By Audrey Corbett
Deputy Clerk

79-1280

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

JOHN P. HEHMAN, Clerk

NOAH H. LUNDY,

Petitioner-Appellee

V.

JIM ROSE, Warden, Tennessee
State Penitentiary,

Resondent-Appellant

O R D E R

Before: CELEBREZZE, ENGEL, and MARTIN, Circuit Judges

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the respondent-appellant has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

John A. Hehman
Clerk

RECEIVED FOR ENTRY
3:00P M
3/21/79

Julia B. Cross
Clerk

BY Nancy F. Lowe
Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NOAH HARRISON LUNDY

VS.

NO. 79-3081-NA-CV

VINSON THOMPSON, Warden, Tennessee State Penitentiary and the ATTORNEY GENERAL FOR THE STATE OF TENNESSEE

ORDER

In accordance with the Memorandum contemporaneously filed, a Writ of Habeas Corpus shall be granted and the defendant discharged from custody unless within ninety (90) days the State of Tennessee initiates steps to try defendant anew.

L. CLURE MORTON

506

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

REC'D FOR ENTRY 3:00P M 3/21/79

John A. Cross Clerk

BY Mary J. Cross Deputy Clerk

NOAH HARRISON LUNDY

VS.

VINSON THOMPSON, Warden, Tennessee State Penitentiary and the ATTORNEY GENERAL FOR THE STATE OF TENNESSEE

NO. 79-3081-NA-CV

MEMORANDUM

Petitioner Noah Harrison Lundy seeks relief pursuant to 28 U.S.C. § 2254 from a judgment of conviction of rape and crime against nature. He has asserted four grounds for relief:

1. Limiting the cross examination of a witness (prosecutrix).

2. The prejudicial conduct of prosecuting attorney in making certain remarks in front of the jury.

3. That the prosecuting attorney commented on the failure of the defendant to testify.

4. The trial court gave an improper charge to the jury that every witness is presumed to swear the truth.

The petitioner asserts that grounds three and four have not been previously presented to any court, state or federal. The records of the state cause reflect that grounds one and two were presented to the highest court in Tennessee having jurisdiction and decided adversely to petitioner. The records further reveal that grounds three and four were not so presented.

Since grounds three and four have not been presented to the state court there has been no exhaustion of remedies as

489

to these two. Thus this court will not consider them in the constitutional framework. However, in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally.

Prosecutorial misconduct and the deprivation of a meaningful cross examination of one of two eye-witnesses (the prosecutrix) was squarely presented in the court proceedings. The Court of Criminal Appeals of Tennessee responded in the following language:

> Error is assigned upon the trial court's ruling that defense counsel could not cross-examine the victim by asking her about specific statements that she supposedly made to defense counsel in a pre-trial interview in defense counsel's office. The predicate for this ruling was the fact that defense counsel did not tell the witness that he was counsel for the defendant, but only that he was a lawyer in the case. The final assignment of error is related to this one, in that it accuses State's counsel of making prejudicial remarks about defense counsel during argument before the jury about the admissibility of these questions.
>
> We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming case before questioning a witness. He apparently made no misrepresentation, and was apparently seeking the truth. State's counsel was unduly critical of defense counsel in indicating before the jury that State's counsel should have been present at the interview, etc., but we hold this error to be harmless in the context of this case.

To properly address the two grounds asserted by petitioner, it is necessary to refer to a substantial amount of testimony. Thus pages 42 through 55 and pages 88 and 113 of the evidence, the argument of the Attorney General to the jury, pages 262 through 268, and the charge of the court on page 291 are made an appendix to this memorandum.

An analysis of the testimony reflects improper conduct of the Attorney General as follows:

(1) On pages 43 and 44 the state's attorney represented to the jury that defense counsel was guilty of illegal and unethical conduct on interviewing the prosecutrix when he knew or should have known that his representation was false.

(2) On page 44 the state's attorney testified to the jury that the prosecutrix was telling the truth. Clearly, this was reprehensible conduct in that the attorney placed his own reputation and the power of the state as vouching for the truthfulness of the testimony of this witness. Neither the attorney nor the State of Tennessee were subject to cross examination. The statement in evidence by General Evans was, "She's telling the truth on the stand . . . ."

(3) The Attorney General stated in the presence of the jury his idea of the proper method for a defense counsel to interview witnesses.

(4) The Attorney General clearly misrepresented the law to the court in connection with the interviewing of the government's witnesses.

(5) The Attorney General represented to the court that the prosecutrix and victim of an alleged criminal event has the right to be represented by counsel and for an attorney general of the State of Tennessee to be present when the witness is interviewed by defense counsel. This is, of course, ridiculous.

(6) The Attorney General represented to the court that because defense counsel interviewed the prosecutrix without an attorney or the state's attorney present, the conduct of defense counsel was inexcusable. This is less than the conduct required of an attorney general charged with the equal treatment of all citizens.

(7) The Attorney General denied an intention to file a grievance with the "Bar Association" because of the aforementioned

alleged unethical conduct. The implication that such a grievance would be valid constitutes an effort to browbeat defendant's counsel.

(8) Through the objections of the Attorney General, which had no legal basis, the court was induced to deprive defendant of the right to effectively cross examine the victim, possibly the most important witness against defendant. The objection and ruling were that the witness could not be examined as to previously conflicting statements prefaced by, "Did not you tell me on [a prior] occasion . . . ." As stated by the appellate court in this cause, the ruling was erroneous. An attorney for the State of Tennessee represents that he has sufficient knowledge to properly prosecute cases without infringing the Sixth Amendment rights of defendants. If this prosecutor had such knowledge, it was not evidenced in this cause.

(9) The Attorney General stated in the presence of the jury, "I would think the defendant's violent nature would be material in this case . . . ." Once again the prosecuting attorney placed his personal testimony before the jury. By this statement he indicated to the jury that the State of Tennessee vouched for such a fact.

(10) In the final summation by the Attorney General he used the word "I" innumerable times. He continuously testified and added his personal evaluations to the State's proof. Some examples are:

(a) I cannot imagine in my own mind a worse crime being committed, a more personally humiliating crime being committed.

(b) I can't think of a more grave or upsetting crime than the ones we'ves[sic] heard here for the last two days.

(c) The only story we've heard about what happened from 8:15 on the night of March 16th until about 4:00 in the morning of March 17th <u>came from the State's witnesses</u>. (Emphasis supplied)

(d) I don't think it's important, but . . . .

(e) Now, I, like General Gill, could not believe the words I was hearing back when we started this case . . . . (emphasis supplied)

(f) Well, I think it's pretty important to her.

(g) I don't think she'll ever forget what she went through that night out there.

(h) . . . and the first question I asked that lady when I talked to her was why she got in the car, and she thought they were in the neighborhood, and it was raining, and she wanted to get a ride home. She's about as lazy as I am, I guess.

The very minimum interpretation of this statement to the jury is that the Attorney General was testifying to a conversation which occurred in his first interview with the prosecutrix in his office. In addition he was giving testimony as to the reason for the action of the prosecutrix in entering the defendant's car, i.e., laziness.

503

(i) On the other hand, if you think as I do, and I've never wanted to be on a jury more in a case I've tried, that this is one of the most despicable crime I have ever heard testimony presented in six years of being in prosecution . . . . (emphasis supplied)

. . . and I don't mean ten years, and I don't mean twenty years, and I don't even mean ninety-nine years. I mean forever. If you agree with me that it is despicable as I feel it is, I want you to set a term that . . . .

In addition to the lack of opportunity to cross-examine, the foregoing testimony of the Attorney General was prejudicial in that he made a factual comparison of testimony in similar cases based on his personal experience as a representative of the great State of Tennessee.

(j) I don't think there's anything unreasonable about a term of years that will make sure he spends the rest of his life in the penitentiary, and that's a term way over the standard fifty or sixty or seventy years for rape.

In addition to advising the jury of his personal opinion (not subject to cross-examination and a direct violation of ethical standards), the Attorney General represented that there was a standard term of incarceration on conviction for rape of from fifty to seventy years. Any first-year law student would recognize this statement as being a deliberate falsehood. Even though the court instructed the jury there was no standard, the prosecuting attorney had placed before the jury the thought that some kind of measuring stick did in fact exist.

The above related items were followed by the charge of the court which contained the following:

> The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, for every witness is presumed to swear the truth." (emphasis supplied)

Without determining the legality of the above charge (See generally, Cupp v. Naughten, 414 U.S. 141 (1973)), since this question has not been presented to the courts of the State of Tennessee, and assuming as we must that the jurors followed the law as given by the court, the jurors were instructed that they must presume that the testimony given by the victim was true. The jury had no opportunity to determine whether the witness had made a conflicting statement to the defense attorney prior to trial. This when coupled with the personal testimony of the Attorney General, both during the presentation of the State's case and during argument, constitutes a clear violation of defendant's right to a fair trial. Also, subject to the question of exhaustion of state remedies, where there is added to the trial atmosphere the comment of the Attorney General that the only story presented to the jury was by the state's witnesses there is such mixture of violations that one cannot be separated from and considered independently of the others.

Aside from addressing the illegal restriction on defense counsel of the cross examination of a key state witness, the state court addressed the remaining issues in the following language: "We have carefully examined all assignments of error. We affirm the convictions."

This court is aware that there is sufficient evidence, if believed by the jury, to sustain the conviction of the petitioner for this terrible crime. However, that evidence is overwhelming only if the testimony of the prosecutrix (victim) is likewise believed. Under the charge as given, the limitation of cross examination of the victim, and the flagrant prosecutorial misconduct this court is compelled to find that petitioner did not receive a fair trial, his Sixth Amendment rights were violated and the jury poisoned by the prosecutorial misconduct.

See Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed. 2d 347 (1974). Cf. Donnelly v. De Christoforo, 416 U.S. 637, 644, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). (Prosecutorial impropriety did not amount to denial of fair trial where trial judge "took special pains" to correct any misimpression of jury.) See generally, United States ex rel. Fournier v. Pinto, 408 F.2d 539 (3rd Cir. 1969).

The Writ shall be granted and the defendant discharged from custody unless within ninety (90) days the State of Tennessee initiates steps to grant defendant a new trial.

L. CLURE MORTON
CHIEF JUDGE

This opinion will be released and filed on August 30, 1974, at 10 o'clock A.M.
JOHN A. PARKER, Clerk

FILED
AUG 30 1974
JOHN A. PARKER, Clerk
By

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

KNOXVILLE, APRIL, 1974

NOAH LUNDY,
Plaintiff-in-Error

v.

STATE OF TENNESSEE,
Defendant-in-Error

No. 283

Knox County

Hon. Richard R. Ford, Judge

(Rape and Crime Against Nature)

106

For the Plaintiff-in-Error:

Dale C. Workman and
Geoffrey D. Kressin
Knoxville, Tennessee

For the Defendant-in-Error:

David M. Pack
Attorney General

Bart Durham
Assistant Attorney General

Lance D. Evans and
John W. Gill, Jr.
Assistant District Attorneys General

Opinion Filed: AUG 30 1974

AFFIRMED

WILLIAM S. RUSSELL,
Judge

OPINION

The plaintiff-in-error, Noah Lundy, indigent and represented by appointed counsel, appeals his convictions for rape and a crime against nature and consecutive penitentiary sentences of one hundred twenty (120) and five (5) to fifteen (15) years.

The alleged rape victim, Sharon Murphy, was enticed into Lundy's automobile by Lundy's fourteen-year-old female companion, Terri Tankersly, at his direction, on the pretext of giving the victim a ride home. Miss Murphy had walked alone to a neighborhood market to purchase solft drinks shortly after 8 p.m. It had begun to rain. She entered the car in response to an offer of a ride in the belief that the couple lived in the neighborhood. Lundy did drive her past the apartment where she was living, but refused to stop the car. The victim testified that after passing her home Lundy restrained her by grabbing her arm, subsequently ordered her to change places with the other girl by moving to the center seat position, and as they continued to drive ordered her to remove all of her clothing. The victim asked Terri Tankersly if she had to, and was given an affirmative answer. Lundy told the victim that he would knock her brains out if she didn't undress. Scared and crying, Miss Murphy completely disrobed. Lundy put his hand between her legs, she slapped it and he removed it. At Lundy's direction Terri Tankersly blindfolded the victim with Miss Murphy's bra.

When the three arrived at Lundy's apartment the victim was allowed to put back on her shorts and a jacket and was led inside. Terri Tankersly brought the balance of her clothing. Once inside the apartment Lundy ordered her to completely disrobe again, and to get upon the bed. Her blindfold was removed at her request. He also undressed. The victim asked for a drink of water, which

the other girl got for her. Lundy made her drink some whiskey from a bottle from which he was imbibing. He then ordered Miss Murphy to lie on the bed. She testified that he took her hands and held them up over her head as he commenced intercourse.

Miss Murphy at no time fought, screamed, ran or in any way resisted the intercourse. No weapon was ever used or displayed by Lundy. Miss Murphy was concerned that they would hurt, or kill her; and begged them not to. It seems fair to say that the victim was more apprehensive about possibly being hurt or killed than she was about being sexually violated, as she was passively submissive. It cannot be denied, however, that she was totally within the power of her captors, and her obedience to submission orders must be weighed in that context.

After the first act of intercourse, which apparently did not result in a sexual climax for Lundy, he ordered Terri Tankersly to put a cloth on the kitchen table. He then ordered the victim to go to the kitchen and lie upon her back upon the table, with her head hanging over the edge. He threatened to knock her brains out if she didn't comply. When thus positioned, he ordered Miss Murphy to open her mouth, and "he stuck his penis down my throat". She gagged and pushed him away, at which time he viciously struck her with his fist upon the cheek, the mouth and the forehead. The victim commenced crying again. He made her lie back down again, and inserted his penis down her throat and moved it in and out, and she started to vomit and pushed him away again. He struck her with his fist upon the abdomen and upon the right side. She got off the table, crying, and asked for a drink of water. His response was to make her get down on her knees and he urinated in her mouth, making her swallow most of the urine.

Lundy then ordered the victim back into the bed, already occupied by the disrobed Terri Tankersly. He first ordered Miss

Murphy to insert her finger into the other girl's vagina and manipulate it, despite Terri Tankersly's begging him not to. After this was done he ordered Miss Murphy to suck the other girl's vagina. When compliance did not suit Lundy, he struck Miss Murphy twice upon the back of her head with his fist. She then performed the cunnilingus for about two minutes before becoming sick. He then allowed her to stop. Terri Tankersly testified that while Miss Murphy was performing cunnilingus upon her that Lundy was "trying to have relationship with her in her rear end".

Finally, Lundy had normal intercourse with the victim again, for more than thirty minutes, without ever reaching a climax. He discussed tying Miss Murphy to the bed and keeping her for two or three days, and even had the other girl to tie some socks together to use for bindings. However, at the victim's suggestion, he went to sleep. Significantly, Terri Tankersly, the fourteen year old companion of Lundy and with whom he had admittedly been having sexual intercourse for years, fled the apartment as soon as Lundy was asleep. She tried to get Miss Murphy to go with her, expressing the fear that he was going to kill both of them; but the victim was afraid to leave at that time for fear of awakening Lundy, who had an arm and leg across her. Some two hours later, when he turned over, she fled the premises, hailed a passing taxi, and immediately reported having been kidnapped and raped. 109

All of this obscene detail has been necessary to this opinion because of the serious question raised as to whether the intercourse was forcible rape. No weapon was ever exhibited, and no resistance was offered. Both sides rely upon the case of King v. State, 210 Tenn.150, 357 S.W.2d 42(1962). Unquestionably the act to constitute rape must be forcibly done and against the will of the female. Force means power, compulsion or strength directed toward an end. And against her will means against or without her consent express or implied. King v. State, supra. Whether force

-3-

was used is a jury question. In this case, apparently no significant force was directly employed in conjunction with the acts of normal intercourse. The victim was told to submit and she did. But, in context, it cannot be said that she consented, nor can Lundy seriously contend that she did. At all times she was a captive, in justified fear for her very life. Admittedly having had some prior sexual experience, she chose to submit to avoid injury or even death. Consent obtained by force or fear due to threats of force is void and the offense rape. 1 Wharton's Criminal Law and Procedure 649, §311. Her tacit consent by non-resistance has been found by the jury to be no consent under the circumstances. She did not consent to being kidnapped and imprisoned; and it was in that context that she was raped. It would be an unreasonable misapplication of the law to require as a matter of law that a captured female be required to incur a beating before it could be said that demanded intercourse with her was rape. The force and restraints inherent in the situation supply the forcible character to the act. We hold in response to the first two assignments of error, that the convicting evidence on the charge of rape is legally sufficient to support the conviction and that it was not error for the trial judge to refuse to direct a not guilty verdict. A jury question was certainly presented by the proof.

The cunnilingus which Lundy forced the two girls to engage in is the basis for his crime against nature conviction. It is assigned as error that both convictions cannot stand because "there was only one common intent". It is clear under these facts that different evidence is required to establish the two different acts, and that a different and separate intent was reflected. The assignment is overruled. See Ward v. State, Tenn.Crim.App., 486 S.W.2d 292; Harris v. State, 206 Tenn.276, 332 S.W.2d 675; and Rockett v. State, Tenn.Crim.App.475 S.W.2d 561. Error is assigned upon the trial court's refusal to charge a certain "special request".

It was defense counsel's theory that the State could not impeach any of the testimony of Terri Tankersly, whom they had called as a prosecution witness, and a note was passed to the trial judge, in response to his invitation for special requests, asking him to charge the law relative to the State's attesting to the credibility of the witnesses it calls. No specific language was tendered; so, in legal affect, no special request was made. The note said: "Defendant Noah Lundy requests the Court to give its standard and normal charge that one party to the case calling a witness in its behalf makes that person that side's witness and the legal effect thereof as to the other testimony being binding and the side calling the witness attesting for credibility". The charge as given was correct. If more specificity and enlargement on a given point was desired it was necessary to tender the exact charge requested. The trial judge noted: "Refused. Ambiguous and unclear. The Court's charge was adequate as given". We need not reach the question of sunstantive law sought to be raised, because the "special request" was not in a proper form to raise it. However, no authority is cited for the theory, if it be plaintiff-in-error's theory, that a criminal court judge must charge the jury that the State vouches for the credibility of each and every one of its witnesses, and is bound by their testimony. The assignment is overruled.

A related assignment complains that the State was permitted to ask questions of Terri Tankersly, their witness, which were of an impeaching nature. We do not find that this happened. On redirect examination she was asked questions which amplified her answers upon cross-examination, as was proper.

Error is assigned upon the admission into evidence of Lundy's written statement to officers, voluntarily given after full warnings. The sense of the assignment seems to be that the statement was not a full confession, so was inadmissible as a confession

It was admissible for whatever probative value that it had upon the issue of guilt, and the assignment is overruled.

The next assignment has to do with the victim's report to officers immediately after her escape. She gave them a detailed account of the events, substantially as she testified to them. One of the officers was permitted to testify as to exactly what she reported by referring to the written statement which he took from her. It is well settled that the report of a rape victim, given within a reasonable time after the fact, is competent evidence. King v. State, supra. That the report was reduced to writing adds to the accuracy of the offier's testimony, and certainly does not render the otherwise competent evidence incompetent.

The next assignment of error relates to the statement of Terri Tankersly, also given to officers shortly after the crime. Complaint is made that this statement was incompetent evidence. We find that this evidence was first gone into on cross-examination and thus made competent. The trial judge committed no error.

Error is assigned because of an attempt by the State to prove that Lundy had physically abused Terri Tankersly's sister years before in a totally unrelated occurence. The trial court properly excluded the evidence and instructed the jury to disregard the question. State's counsel made some remarks in the presence of the jury that were overly zealous in support of this incompetent line of proof, and in a different case could constitute prejudicial error. State's counsel alluded to "the defendant's violent nature" as being a matter of fact; and said that the State was trying to show that he was "that kind of a person". However, in the context of the undisputed facts of this case we hold any error to have been harmless beyond a reasonable doubt. Chapman v. California, 386 U.S.18, 87 S.Ct.824, 17 L.Ed.2d 705(1967); Huffman v. State, _____Tenn.Crim.App._____, 458 S.W.2d 29(1970).

-6-

victing the defendant of a crime against nature on the theory of aiding and abetting. Another related assignment is that the conviction on the charged act of cunnilingus is void and invalid because cunnilingus "is not prohibited as a crime against nature in T.C.A.§39-707".

This Court has recently held, in the context of a case of forcible cunnilingus committed by the defendant upon a victim, that the act was a crime against nature as proscribed by T.C.A.§39-707. Locke v. State, Tenn.Crim.App., 501 S.W.2d 826(1973). Again, in the case sub judice, you have the element of coercion, this time motivating both of the literal participants. Here, the direct participants were both female. Plaintiff-in-error contends that neither of the females was committing a crime under the circumstances, and reasons that there was no principal criminal whom Lundy could have been guilty of aiding and abetting.

Lundy was not indicted as an aider and abettor. He was charged: "* * * unlawfully and feloniously did commit a crime against nature in and upon one Sharon K. Murphy; that is to say, that the said Noah Lundy, Alias, did make, force and compel the said Sharon K. Murphy to perform an act of cunnilingus upon the said Terri Tankersly, a female, * * *".

The evidence certainly supports the factual allegations of the indictment. Lundy was not accused of aiding and abetting, but of forcing the commission of the proscribed act. Whether Sharon K. Murphy is called the victim, or Terri Tankersly, or nobody, is really immaterial. Crimes against nature may be victimless, with both parties as accomplices of one another; or they may involve an innocent person forced to participate, or incapable of consenting. In the case sub judice, both of the females were victimized.

The trial judge did charge the law of principal guilt by

being present, aiding and abetting, as set out in T.C.A.§39-109, as follows:

> "39-109. Aiders and abettors deemed principal offenders. —— All persons present, aiding and abetting, or ready and consenting to aid and abet, in any criminal offense, shall be deemed principal offenders, and punished as such."

We also have a statute which provides for the conviction of an aider and abettor whether the prinicpal offender has been convicted or not. T.C.A.§39-110. That statute does, however, presuppose that a principal exists; while in the instant case Lundy is himself the only principal. By forcing others to do an act which society has proscribed Lundy is himself directly responsible. The force and coercion was his active contribution to the cunnilingus. While the judge's charge dealt with aiding and abetting, and with conspiracy, and did not directly charge the jury that Lundy would be himself criminally chargeable with acts which he forced others to perform, the charge did say" "If, therefore, you find from the proof beyond a reasonable doubt that this offense has been committed by the defendant in manner and form as charged in the indictment * * * the defendant is guilty of the crime against nature and you should convict him of this offense* * *". In the absence of a special request for further instructions, we do not find reversible error in the charge. While the questions presented by the factual situation in this case are fuel for an academic trip of almost limitless dimensions, and would delight any law professor, we confine ourselves to holding that forced cunnilingus is a crime against nature, and that Lundy was more than an aider and abettor and was convicted under the indictment as the principal offender who forced the criminal act. No other principal is necessary to his conviction.

114

Error is assigned upon the trial court's ruling that defense counsel could not cross-examine the victim by asking her about specific statements that she supposedly made to defense counsel in

a pre-trial interview in defense counsel's office. The predicate for this ruling was the fact that defense counsel did not tell the witness that he was counsel for the defendant, but only that he was a lawyer in the case. The final assignment of error is related to this one, in that it accuses State's counsel of making prejudicial remarks about defense counsel during argument before the jury about the admissibility of these questions.

We note that the trial judge permitted cross-examination upon the same subject matter, but simply ruled out predicating the cross-examination questions upon the prior questions and answers. From the tender of proof in the record we do not believe that defendant was prejudiced by what we deem to have been too restrictive a ruling. Defense counsel was under no positive duty to affirmatively identify his role in the upcoming case before questioning a witness. He apparently made no misrepresentation, and was apparently seeking the truth. State's counsel was unduly critical of defense counsel in indicating before the jury that State's counsel should have been present at the interview, etc., but we hold this error to be harmless in the context of this case. 115

We have carefully examined all assignments of error. We affirm the convictions.

William S. Russell, Judge

CONCUR:

W. Wayne Olivér, Judge

Robert K. Dwyer, Judge

OCT 15 1974
JOHN A. PARKER, Clerk
BY

TO THE HONORABLE SUPREME COURT OF THE STATE OF TENNESSEE

AT KNOXVILE

OR TO ANY OF THE JUSTICES THEREOF

NOAH LUNDY Petitioner-In-Error	)	
VS.	)	NO. _____
STATE OF TENNESSEE Defendant-In-Error	)	

116

FOR PETITIONER-IN-ERROR:

DALE C. WORKMAN
Bank of Knoxville Building
Knoxville, TN 37902

GEOFFREY D. KRESSIN
226 Greater Tennessee Building
Knoxville, TN 37902

FOR DEFENDANT-IN-ERROR

R. A. ASHLEY, JR.
Attorney General

BART DURHAM
Assistant Attorney General
211 Supreme Court Building
Nashville, TN 37219

SUPREME COURT OF TENNESSEE, AT KNOXVILLE
SEPTEMBER TERM, 1974

DECREE

Filed March 10, 1975
John A. Parker, Clerk

NOAH LUNDY

(Nos. 7517 and 7518)

Vs.

STATE OF TENNESSEE

Knox Criminal

WRIT DENIED

This case coming on to be heard upon a transcript of the record from the Criminal Court of Knox County, opinion and Decree of the Court of Criminal Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition is denied.

The petitioner, Noah Lundy,

will pay the costs incident to filing petition for certiorari, for which let execution issue.

131

PER CURIAM

Office-Supreme Court, U.S.
FILED
MAY 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE, Warden,
Petitioner,

v.

NOAH H. LUNDY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

WILLIAM M. LEECH, JR.
ATTORNEY GENERAL
STATE OF TENNESSEE
JOHN C. ZIMMERMANN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3231

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Whether a petition for relief under 28 U.S.C. §2254 should be dismissed, without prejudice, where the petition presents several claims for relief but where one or more of the claims have not been presented to the state courts thereby failing to satisfy the exhaustion requirements of 28 U.S.C. §2254(b).

2. Whether habeas corpus relief was properly granted to the respondent on the grounds of prosecutorial misconduct and an improper instruction where these issues were either waived because of procedural defaults or were harmless beyond a reasonable doubt as found by the state courts.

3. Whether the respondent was denied his right of confrontation when the state trial court limited his cross-examination of the rape victim concerning alleged prior contradictory statements about her lack of chastity.

4. Whether the district court erred by granting habeas relief without ordering expansion of the record so as to include the entire state trial transcript.*

---

* Former Warden Vinson Thompson and the Attorney General of Tennessee were originally named as respondents in the district court. On April 12, 1979, Warden Jim Rose was substituted for Vinson Thompson pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

TABLE OF CONTENTS

	Page
Table of Authorities	iv
Opinions Below	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
Summary of Argument	9
Argument	12
I. Principles Of Comity Dictate That A Federal Court Dismiss Petitions Under 28 U.S.C. 2254 Which Contain A Mixture Of Exhausted And Unexhausted Claims For Habeas Corpus Relief	12
A. The exhaustion doctrine was intended to require a state prisoner to present all federal claims to the state courts for resolution prior to invoking the jurisdiction of a federal court.	13
1. Prior to 1948 the decisions of this Court required exhaustion of all claims unless the state procedures were inadequate or exceptional circumstances necessitated immediate review	13
2. The exhaustion doctrine, as crafted by this Court, was codified by Congress in 1948	15
3. Subsequent development of the exhaustion doctrine has preserved its original intent	16

B. Dismissal of mixed petitions for habeas relief, without prejudice, would further the interests of the state, the federal courts, and the prisoner 17

1. Important interests of the State require exhaustion of all claims 19

2. The need for orderly administration of the federal courts mandates exhaustion of all federal claims 21

3. The interests of the prisoner are not prejudiced by requiring exhaustion of all claims 22

II. The District Court Improperly Granted Habeas Relief On The Ground Of Prosecutorial Misconduct ... 24

A. The remark concerning Lundy's violent character was harmless beyond a reasonable doubt 26

B. The district court erroneously granted habeas relief for the remaining acts of prosecutorial misconduct 30

III. The District Court Erroneously Concluded That Lundy's Right Of Confrontation Was Denied When The State Trial Court Limited His Cross-Examination Of The Rape Victim 32

IV. The Court Of Appeals Should Have Remanded The Cause For A Full And Fair Evidentiary Hearing ... 34

Conclusion 37

TABLE OF AUTHORITIES

Cases Cited

Aston v. Warden, 574 F.2d 1169 (4th Cir. 1978) 36

Bowman v. Henard, 547 S.W.2d 527 (Tenn. 1977) 20

Braden v. 30th Judicial Circuit Court, 410 U.S. 484 (1973).....18,19,22

Browder v. Director, Department of Correction of Illinois, 434 U.S. 257 (1978) 36

Brown v. Allen, 344 U.S. 443 (1953) 15,19,22

Carothers v. Rhay, 594 F.2d 225 (9th Cir. 1979) 22

Chapman v. California, 386 U.S. 18 (1967) 29,35

Collins v. Frisbie, 189 F.2d 464 (6th Cir. 1971) 16

Darr v. Burford, 339 U.S. 200 (1950) 15,16

Davis v. Alaska, 415 U.S. 308 (1974)..... 33

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) ...10,31,32,35

Earl v. Estelle, 503 F.Supp. 406 (N.D. Tex. 1980)..... 24

Edwards v. State, 540 S.W.2d 641 (Tenn. 1976), *cert denied,* 429 U.S. 1061 30

Ex parte Hawk, 321 U.S. 114 (1944) 15

Ex parte Royall, 117 U.S. 241 (1886) 9,13,19

Fay v. Noia, 372 U.S. 391 (1963) 15

Frady v. United States, 636 F.2d 506 (D.C. Cir. 1981) .. 31

Francisco v. Gathwright, 419 U.S. 59 (1974) 17

Frisbie v. Collins 16

Galtieri v. Wainwright, 582 F.6d 348 (5th Cir. 1978), en banc 9,12,17,21

Gonzales v. Stone, 546 F.2d 807 (9th Cir. 1976) 9,12,17

Gooding v. Wilson, 404 U.S. 518 (1972) 16

Guy v. State, 1 Tenn. Crim. App. 266, 443 S.W.2d 520 (1969) 33

Hankerson v. North Carolina, 432 U.S. 233 (1977) 23

Harrington v. California, 395 U.S. 250 (1969) 35

Henderson v. Kibbe, 431 U.S. 145 (1977) 31

Hockenbury v. Sowders, 620 F.2d 111 (6th Cir. 1980) .. 22,31

Huwett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969) 18

Katz v. King, 627 F.2d 568 (1st Cir. 1980) 12

Lamberti v. Wainwright, 513 F.2d 226 (5th Cir. 1975) .. 19

Manning v. State, 195 Tenn. 194, 157 S.W.2d 6 (1953) .. 30

McGowen v. State, 221 Tenn. 442, 427 S.W.2d 555 (1968) 33

Miller v. State, 584 S.W.2d 758 (Tenn. 1979) 20

Mooney v. Holohan, 294 U.S. 103 (1935) 14

Moore v. Dempsey, 261 U.S. 86 (1923) 14

Murch v. Mottram, 409 U.S. 41 (1972) 20,21

Parr v. United States, 351 U.S. 513 (1956) 21

Picard v. Connor, 404 U.S. 270 (1971) 9,16,19

Robb v. Connolly, 111 U.S. 624 (1884) 19

Roberts v. LaVallee, 389 U.S. 40 (1967) 19

Sanders v. United States, 373 U.S. 1 (1963) 21,23

Schneckloth v. Bustamonte, 412 U.S. 218 (1973)..... 21

State *ex rel.* Anglin v. Mitchell, 596 S.W.2d 779 (Tenn. 1980) 20

Stone v. Powell, 428 U.S. 465 (1976) 15,17

Sumner v. Mata, ____ U.S. ____, 101 S.Ct. 764 (1981) 10,21,29, 33

Triplett v. Wyrick, 549 F.2d 57 (8th Cir. 1977) 18

United States *ex rel.* Boyance v. Myers, 373 F.2d 111 (3d Cir. 1967) 18

United States *ex rel.* Kennedy v. Tyler, 269 U.S. 13 (1925) 14

United States *ex rel.* Martin v. McMann, 348 F.2d 896 (2d Cir. 1965), en banc 18

United States *ex rel.* McNair v. New Jersey, 492 F.2d 1307 (3d Cir. 1974) 36

United States *ex rel.* Mitchell v. Follette, 358 F.2d 922 (2d Cir. 1966) 36

Vester v. Stephenson, 465 F.Supp. 868 (E.D. N.C. 1978) 22

Wade v. Mayo, 334 U.S. 672 (1948)..... 19,23

Wainwright v. Sykes, 433 U.S. 72 (1977) 10,16,20,31

Walters v. State, 578 S.W.2d 652 (Tenn. Crim. App. 1978) 34

Watson v. Patterson, 358 F.2d 297 (10th Cir. 1966) 18

Willette v. State of Georgia, 608 F.2d 538 (5th Cir. 1979) 36

Constitution and Statutory Provisions Cited

Revised Judicial Code,

section 2254 15

Rules Governing Section 2254 Cases,

9(a)-(b), 28 U.S.C. foll. §2254 24

Rules Governing Section 2254 Cases,

9(b), 28 U.S.C. foll. §2254 21

Rules Governing Section 2254 Cases,

Rules 5, 7-8, 28, U.S.C. foll. §2254 35

Tenn. Code Ann.

§40-2445 (Supp. 1980) 34

§40-3801 *et seq* 13

Tenn. Const., art. X, §1 19

28 U.S.C. §2254 9,15

28 U.S.C. §2254(d) (1970) 10,16,21,29,33

Other Authorities Cited

Developments in the Law - Federal Habeas Corpus, 83 Harv.L.Rev. 1038 (1970) 15,35

Federal Rules of Evidence, Rule 412 34

No. 80-846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE, Warden,
Petitioner,

v.

NOAH H. LUNDY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The unreported memorandum opinion of the United States Court of Appeals for the Sixth Circuit was rendered on June 27, 1980. (J.A. 95). The unreported memorandum opinion of the United States Court of Appeals for the Sixth Circuit denying rehearing was rendered on September 4, 1980. (J.A. 97). The unreported memorandum opinion of the United States District Court for the Middle District of Tennessee, Nashville Division and order granting respondent's petition for writ of habeas corpus was rendered on March 21, 1979. (J.A. 87).

The opinion of the Tennessee Court of Criminal Appeals affirming Lundy's state convictions on August 30, 1974, is reported at 524 S.W.2d 591. (J.A. 52). The Tennessee Supreme Court denied Lundy's petition for writ of certiorari on March 10, 1975.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state . . . shall . . . deprive any person of life, liberty, or property, without due process of law . . ..

3. 28 U.S.C. §2254 provides in pertinent part:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State . . ..
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
>
> (d) In any proceeding instituted in a Federal court by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a pro-

ceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidence by a written finding, written opinion, or other reliable and adequate written indicia shall be presumed to be correct. . ..

4. The provisions of Tenn. Code Ann. §40-3802 provide:

A prisoner in custody under sentence of a court of this state may petition for post-conviction relief under this chapter at any time after he has exhausted his appellate remedies or his time for appeal in the nature of a writ of error has passed and before the sentence has expired or has been fully satisfied.

5. The provisions of Tenn. Code Ann. §40-3805 provide:

Relief under this chapter shall be granted when the conviction or sentence is void or voidable because of the abridgement in any way of any right guaranteed by the constitution of this state or the Constitution of the United States, including a right that was recognized as existing at the time of the trial if either constitution requires retrospective application of that right.

6. The provisions of Tenn. Code Ann. §40-3811 provide as follows:

The scope of the [post-conviction] hearing shall extend to all grounds the petitioner may have, except those grounds which the court finds should be excluded because they have been waived or previously determined, as herein defined.

7. The provisions of Tenn. Code Ann. §40-3812 provide as follows:

A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of

competent jurisdiction in which the ground could have been presented. There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

STATEMENT OF THE CASE

Noah Lundy was convicted by a jury, contrary to his pleas, of rape and crime against nature and was sentenced to terms of 120 years and 15 years, respectively, in the Tennessee State Penitentiary. (J.A. 53). Lundy's convictions were affirmed by the Tennessee Court of Criminal Appeals on August 30, 1974; the Tennessee Supreme Court denied review on March 10, 1975. (J.A. 52). Lundy then petitioned the Knox County Criminal Court, Tennessee, for post-conviction relief which was denied, after an evidentiary hearing, on May 3, 1976. (J.A. 62). No appeal was taken.

Lundy then petitioned the United States District Court for the Middle District of Tennessee, Nashville Division, for a writ of habeas corpus under the provisions of 28 U.S.C. §2254 and alleged four grounds for relief: (1) that he was denied his right of confrontation during cross-examination of the prosecutrix; (2) that he was denied his right to a fair trial because of a prejudicial remark made by the prosecuting attorney to the jury to the effect that Lundy had a violent character; (3) that he was deprived of his right to a fair trial when the prosecuting attorney commented, during closing argument, that the only proof before the jury was from the State's witnesses which was uncontradicted and unrebutted; and, (4) that the trial judge improperly instructed the jury that every witness is presumed to swear the truth. (J.A. 64).

The district court granted habeas relief to Lundy on March 21, 1979, which decision was affirmed by the United States Court of Appeals for the Sixth Circuit. (J.A. 95).

At Lundy's trial the rape victim, Sharon Murphy, was cross-examined before the jury as follows, which is the subject of Lundy's first claim for habeas corpus relief:

> Q. So you had had intercourse with boys during 1973, is that true or not true?
>
> A. Just Aaron Miller.
>
> Q. And you had intercourse with Danny Nipper, a boy by the name of Danny Nipper, had you not?
>
> A. Not in the year '73. That was the year before in '72.
>
> Q. I believe you had intercourse with Aaron Miller ten to twenty times during this period, had you not?
>
> A. I don't remember how many times.
>
> Q. *That's what you told me previously.*
>
> A. *I don't remember.*
>
> * * *
>
> Q. Miss Murphy, *did you or did you not tell me on an occasion when I talked with you that you had intercourse with Aaron Miller ten to twenty times?*
>
> A. *I don't remember.*

(J.A. 6-7) [emphasis added].

An objection was made to this line of examination by the prosecuting attorney which was sustained by the trial court, following a jury-out hearing, upon the erroneous ground that defense counsel failed to properly identify himself to the witness during the interview. (J.A. 13). On direct appeal, the Tennessee Court of Criminal Appeals held such reasoning to be erroneous but harmless in light of the offer of proof subsequently made at the jury-out hearing. There, Lundy's counsel had an opportunity to question the rape victim concerning her prior statements

allegedly made in the pre-trial interview. The offer of proof was as follows:

> Q. Did you or did you not tell me when I spoke with you that you had had intercourse with one Aaron Miller ten to twenty times . . ..
>
> A. *I don't remember if I said exactly that.*
>
> Q. Did you tell me you had had intercourse with Danny Nipper four times.
>
> A. I remember telling you I had had intercourse with him, *but I don't remember how many times I had told you.*

(J.A. 24) [emphasis added].

This district court held that the state court's refusal to permit the above examination to be placed before the jury amounted to a denial of Lundy's right of confrontation in violation of the Sixth Amendment. The court of appeals agreed.

In support of a proffer of evidence the prosecuting attorney made the following remarks before the jury, which is the subject of Lundy's second claim for relief:

> Q. Tell the jury whether or not you ever witnessed any difficulties between your sister, while she was dating the defendant, and the defendant?
>
> MR. WORKMAN: Your Honor, I still don't see that materiality of this as to . . .
>
> GENERAL GILL: *I would think the defendant's violent nature would be material to this case in light of what the victim had testified to.*
>
> MR. WORKMAN: Your Honor . . .
>
> GENERAL GILL: I assume they claim that he's not this kind of person, and we're trying to show that he is. That's materiality.

> MR. WORKMAN: Your Honor, if I may finish my statement, I don't see any materiality to this case. He's charged in this case with rape and crime against nature.
>
> GENERAL EVANS: Are you finished now. I will explain, Your Honor. This young lady explained in detail that one of the reasons that she reacted the way she did was because of this advice she received from this young lady. I think it's proper to show why this young lady was given the advice she was.

(J.A. 17-18) [emphasis added].

The trial court then excused the jury from the courtroom to determine the admissibility of such examination. (J.A. 18). The defendant's objection was sustained and the jury thereafter was instructed to disregard the prosecutor's remark. The Tennessee Court of Criminal Appeals found the prosecutor's remark to have been error; but after reviewing the undisputed evidence found the error to have been harmless beyond a reasonable doubt. (J.A. 58). The district court found the remark to have been error especially when weighed with many other acts of prosecutorial misconduct. (J.A. 91, 93). The court of appeals affirmed and said that Lundy's second claim for relief amounted to a constitutional violation warranting federal habeas relief. (J.A. 96).

During closing arguments the prosecuting attorney, in rebutting the defense counsel's summation, made the following remarks which are the subject of Lundy's third claim for habeas corpus relief:

> Now, evidently, the defendant's theory of this case is that we are to believe the minor inconsistencies in the State's proof, and, of course, the State's proof is what we are considering. *The only story we've heard about* what happened from 8:15 of the night of March 16th until about 4:00 in the morning of March 17th *came from the State's*

> *witnesses.* And we're suppose [sic] to think it's important whether or not he was asleep when we got there, whether he was covered or not covered, when the clothes were taken off, whether she was or was not held on the bed, whether or not she was forced with his hands or just suggested that she drink whiskey, and whether or not at one time at some point she had her hands somewhere on his back.

(J.A. 27) [emphasis added].

The district court held that the foregoing statement deprived Lundy of a fair trial in violation of the Fourteenth Amendment. The court of appeals held that the district court did not grant relief on this claim because it had not been presented to the state courts. (J.A. 93, 95-6).

The trial judge instructed the jury as follows, which is the subject of Lundy's fourth claim for habeas corpus relief:

> The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are the judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, for *every witness is presumed to swear the truth.*

(J.A. 31) [emphasis added].

The district court found that this instruction aggravated Lundy's Sixth Amendment claim. (J.A. 93). The court of appeals said that habeas relief was not granted for this claim because it was unexhausted. Lundy never objected to the instruction nor did he raise the issue on appeal.

SUMMARY OF ARGUMENT

I.

Principles of comity dictate that a federal court dismiss a petition under 28 U.S.C. §2254 which contains a mixture of exhausted and unexhausted claims for habeas relief. The exhaustion doctrine recognizes a state's role in having the first opportunity to address federal constitutional claims prior to their presentation to a federal court. *See Ex parte Royall,* 117 U.S. 241 (1886); *Picard* v. *Connor,* 404 U.S. 270 (1971). These principles support the State's argument that a petition for habeas relief which contains a mixture of exhausted and unexhausted claims for relief should be dismissed, without prejudice. Two federal circuits have so applied the exhaustion doctrine. *See Galtieri* v. *Wainwright,* 582 F.2d 348 (5th Cir. 1978), *en banc; Gonzales* v. *Stone,* 546 F.2d 807 (9th Cir. 1976).

Dismissing "mixed" petitions would further the interests of the states by giving them the opportunity to enforce federal constitutional rights in a manner which would provide controlling precedents over their trial courts, would lessen the possibility for inconsistent results between state and federal courts in reviewing the same state conviction, and would minimize the federal interference and disruption of the States' administration of their criminal justice systems. Applying the exhaustion doctrine in this manner would also enhance the orderly administration of federal courts by eliminating piecemeal review of mixed petitions of habeas relief, increasing, the number of state factual findings relative to the federal claims and providing definitive state rulings on matters of state procedural law.

II.

The district court improperly considered claims of prosecutorial misconduct and an improper jury instruction in granting habeas corpus relief. Although the district court noted that one of the two claims of prosecutorial misconduct, as well

as the jury instruction, had not been presented to the state courts, these claims were nevertheless considered by the district court in weighing the harm of the exhausted claims. Most of the prosecutorial misconduct cited by the district court in support of granting the writ was barred from habeas review because of Lundy's state procedural defaults. *See Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). Those few remarks which were presented to the state courts did not amount to egregious misconduct resulting in a denial of due process of law. *See Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974). Further, of those acts of misconduct which were presented to the state courts certain factual findings were made reflecting that the remarks were harmless beyond a reasonable doubt. The district court failed to defer to these findings of fact or state its reasons for ignoring them altogether. 28 U.S.C. §2254(d); *Sumner* v. *Mata*, ___ U.S. ___, 101 S.Ct. 764 (1981).

III.

The lower courts erroneously concluded that Lundy's right of confrontation was abridged when the state trial court limited his cross-examination of the rape victim. Lundy attempted to impeach the testimony of the rape victim by a prior contradictory statement allegedly made in a private interview between Lundy's defense counsel and the rape victim. When the rape victim could not recall making the contradictory statement the state trial court refused to permit Lundy's counsel to further pursue this line of examination. During a jury-out hearing Lundy's counsel was given the opportunity to further examine the rape victim and this examination revealed that Lundy was unable to lay a proper foundation for impeaching the victim's testimony. Under state law Lundy was bound by the victim's denial. However, the district court erroneously concluded that the state trial court should have permitted Lundy to further pursue this fruitless line of examination in the presence of the jury. Such failure, the lower federal courts held, amounted to a Sixth Amendment violation.

IV.

The district court should have ordered expansion of the record to properly review the habeas claims, which the district court, *sua sponte,* increased from four to twenty-three. The *entire* state trial transcript was not filed contemporaneously with the State's answer to the petition. Only portions of the record which had been cited by the petitioner in his petition were filed with the district court. However, it was not necessary for the district court to have the entire state trial transcript in order to deny habeas relief because of the extensive factual findings set forth in the opinion of the Tennessee Court of Criminal Appeals which was filed with the district court. The district court's haste in granting relief nine days after the State timely filed its answer was an abuse of discretion where the district court knew that the entire record contained overwhelming evidence of guilt. Although no request for an evidentiary hearing was made by the State in the district court, the State did make a request to the court of appeals for an opportunity to file the entire state trial transcript which was denied.

ARGUMENT

I.

Principles Of Comity Dictate That A Federal Court Dismiss Petitions Under 28 U.S.C. 2254 Which Contain A Mixture Of Exhausted And Unexhausted Claims For Habeas Relief.

The State contends that a state prisoner should exhaust available state remedies for *all* his claims before petitioning for federal habeas relief. Such a rule would be in accordance with this Court's prior decisions and the intent of Congress. At least two federal circuits apply the exhaustion doctrine in this manner. *See Galtieri* v. *Wainwright,* 582 F.2d 348 (5th Cir. 1978), *en banc; Gonzales* v. *Stone,* 546 F.2d 807 (9th Cir. 1976).[1]

In the present case the district court concluded that Lundy had exhausted his first two claims for habeas relief while the latter two claims had never been presented to the Tennessee courts.[2] Nevertheless, the district court proceeded to review all four claims for relief, over the objection of the State, finding the four claims to be interrelated: "[t]here is such a mixture of violations that one [claim] cannot be separated from and considered independently of the others." (J.A. 93).[3]

The State argues that the Tennessee courts should have been afforded the opportunity to review the unexhausted claims before the district court overturned Lundy's state convictions especially since all four claims were interrelated. Four state court tribunals had promptly reviewed Lundy's challenges to his

---

[1] The court in *Katz* v. *King,* 627 F.2d 568, 574 (1st Cir. 1980) refused to follow this rule.

[2] The court of appeals agreed that two claims were not exhausted but refused to adopt the Fifth Circuit Rule. (J.A. 96).

[3] The district court stated that the unexhausted claims "will not be considered in the constitutional framework" but nonetheless examined the merits of those claims. (J.A. 88, 93).

convictions. There was no finding by either court below that the presently available remedies under Tennessee law are inadequate to review or correct the unexhausted claims or that exceptional circumstances justified immediate reivew.[4]

A. The exhaustion doctrine was intended to require a state prisoner to present all federal claims to the state courts for resolution prior to invoking the jurisdiction of a federal court.

Application of the exhaustion doctrine reflects a federal policy of comity toward state sovereignties which are equally yoked with federal courts to "guard and protect rights secured by the constitution." *Ex parte Royall,* 117 U.S. 241, 251 (1886). Only under very narrowly prescribed circumstances may a state prisoner bypass the state courts and present his claims directly to a federal court. The notion that a state prisoner may seek piecemeal habeas corpus relief in federal courts is contrary to the precedents of this Court and the intent of Congress.

1. Prior to 1948 the decisions of this Court required exhaustion of all claims unless the state procedures were inadequate or exceptional circumstances necessitated immediate reivew.

In *Ex Parte Royall,* 117 U.S. 241 (1886), the Court held that failure to exhaust available state remedies would warrant dismissal of a state prisoner's petition for federal habeas relief unless "special circumstances" existed necessitating immediate action. *Id.,* at 252. Noting the delicate relations between state and federal courts the Court stated:

> The injunction to hear the case [for habeas corpus relief] summarily . . . does not deprive the [federal] court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exer-

---

[4] Tennessee has a liberal post-conviction procedure, enacted in 1967, which permits a state prisoner to challenge his conviction or sentence on federal or state constitutional grounds. Tenn. Code Ann. §40-3801, *et seq.*

> cised in light of the relations existing . . . between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution.

Id., at 251.

This Court later reiterated that habeas review would be deferred pending exhaustion of available state remedies except in those "rare cases where exceptional circumstances of peculiar urgency are shown to exist." *United States ex rel. Kennedy* v. *Tyler*, 269 U.S. 13, 17 (1925). The *Tyler* Court, after surveying prior decisions, concluded that exceptional circumstances existed only when a state interferes with the operations of the federal government or with the relations between the federal government and a foreign nation.[5]

The judicially crafted exhaustion doctrine did not bar, however, a state prisoner from seeking federal habeas relief where the state remedy was inadequate or non-existent. *Moore* v. *Dempsey*, 261 U.S. 86 (1923). In *Mooney* v. *Holohan*, 294 U.S. 103 (1935) the Court denied a petition for habeas relief where the prisoner had failed to properly present his claim to the state courts:

> Orderly procedure, governed by principles we have repeatedly announced, requires that . . . recourse should he had to whatever judicial remedy afforded by the state may still remain open.

Id., at 115.

---

[5] The *Tyler* Court declared that the lower court should have dismissed the petition on grounds of failure to exhaust state remedies rather than upon the merits.

Finally, in *Ex parte Hawk*, 321 U.S. 114 (1944), this Court summarized and reaffirmed the principles of the exhaustion doctrine. The Court noted that a state prisoner could not seek federal habeas relief until the claims had been presented to the state courts except in those rare cases where "exceptional circumstances" were present or where the state remedies were unavailable or seriously inadequate. *Id.*, at 116-118.

2. The exhaustion doctrine, as crafted by this Court, was codified by Congress in 1948.

In 1948 Congress codified the exhaustion doctrine in section 2254 of the Revised Judicial Code.[6] Section 2254 was intended to merely codify the exhaustion doctrine as delineated in the precedents of this Court. *See Darr* v. *Burford*, 339 U.S. 200, 210-214 (1950); *Fay* v. *Noia*, 372 U.S. 391, 434-435 (1963).

Though the wording of the statute requires exhaustion of the "the *question* presented"[7] it is clear that Congress was not addressing the issue of exhaustion of claims as opposed to exhaustion of the entire case. In 1948 neither Congress nor this Court was likely to have been aware of the unique situation posed when a habeas petitioner would later combine exhausted and unexhausted claims in a single petition. At that time very few claims were cognizable on federal habeas review. *See Stone* v. *Powell*, 428 U.S. 465, 475-476 (1976).[8] Until the decision in *Fay* v. *Noia*,[9] federal courts would refuse to consider unexhausted claims where a state prisoner deliberately bypassed state procedures in order to seek federal habeas relief. *Brown* v. *Allen*, 344 U.S. 443, 485 (1953). Therefore, the statutory requirement

---

[6] 28 U.S.C. §2254 (1970) (b)-(c).

[7] *Id.*, §2254(c).

[8] Developments in the Law - Federal Habeas Corpus, 83 Harv. L.Rev. 1038, 1042-1056 (1970).

[9] 372 U.S. 391, 420-426 (1963).

that the "question" be presented to the state court was not intended to encourage piecemeal federal habeas review of mixed petitions and thereby relax the exhaustion requirement.[10] To the contrary, Congress envisioned complete and total exhaustion of each and every claim.

3. Subsequent development of the exhaustion doctrine has preserved its original intent.

The exhaustion doctrine has not been changed or altered by Congress since its codification. Amendments to habeas corpus statutes have merely codified changes as reflected in the decisions of this Court. *See Wainwright* v. *Sykes,* 433 U.S. 72, 80-81 (1977).

The requirement that "special circumstances" must exist to justify a waiver of the exhaustion requirement was reaffirmed by this Court in *Frisbie* v. *Collins,* 342 U.S. 519 (1952). The Court accepted the lower court's finding of "special circumstances" where the petition alleged that the state had acquired jurisdiction over the prisoner by violating a federal kidnapping statute, thereby necessitating immediate review of the state's custody.[11] The requirement that the exhaustion must occur where the state remedies are adequate for providing review of the claim was reaffirmed in *Picard* v. *Connor,* 404 U.S. 270, 272, n. 3 (1971).

This Court has heard only two cases which involved mixed claims in a petition for federal habeas relief. In *Gooding* v. *Wilson,* 404 U.S. 518 (1972) this Court affirmed a grant of habeas relief where the petitioner was convicted under a statute containing First Amendment defects while noting, but not rul-

---

[10] *See Darr* v. *Burford,* 339 U.S. 200, 211-212, n. 33-34 (1950). The 1966 amendment clearly supports the view that Congress desires to narrow, not broaden, habeas review. *See* 28 U.S.C. §2254(d) (1970).

[11] *Collins* v. *Frisbie,* 189 F.2d 464 (6th Cir. 1971).

ing upon, the existence of an unexhausted claim. *Id.* at 519. Two years later in *Francisco* v. *Gathwright,* 419 U.S. 59 (1974), this Court declined a prisoner's request to reverse a lower court's dismissal of his petition of the ground that it contained both an unexhausted and exhausted claim. The Court expressly reserved this issue for future resolution and decided the case on other grounds. *Id.* at 63-64. The State submits that mere consideration of those cases was not tantamount to a imprimatur regarding the proper exercise of federal jurisdiction over mixed petitions for habeas relief. *Cf., Stone* v. *Powell,* 428 U.S. 465, 480-481 (1976) (habeas review of Fourth Amendment claims).

Finally, in 1976 this Court proposed, and Congress approved, procedural rules and a model form for proceedings under section 2254. While the rules do not further address the exhaustion doctrine the form does contain a cautionary note requiring the prisoner to exhaust his state remedies "as to each ground" for habeas relief (*see* J.A. 69). This requirement comports with this Court's prior decisions and the intent of Congress.

B. Dismissal of mixed petitions for habeas relief, without prejudice, would further the interests of the state, the federal courts, and the prisoner.

Following the precedents set by this Court and the intent of Congress, the Fifth and Ninth Circuits require lower federal courts to dismiss, without prejudice, petitions for habeas relief which contain a mixture of exhausted and unexhausted claims for relief. *Galtieri* v. *Wainwright,* 582 F.2d 348, 354 (5th Cir. 1978), *en banc; Gonzales* v. *Stone,* 546 F.2d 807, 810 (9th Cir. 1976). Applying a balancing test these circuits have concluded that the interests of the state prisoner, the state judicial system,

and the orderly administration of the federal courts require that "mixed" petitions be dismissed, without prejudice.[12]

This approach recognizes that the exhaustion doctrine "reflects a careful balance between important interests of federalism and the need to preserve the rule of habeas corpus as a 'swift and imperative remedy ....' " *Braden* v. *30th Judicial Circuit Court,* 410 U.S. 484, 490 (1973). This approach also preserves the interests of the prisoner while advancing important considerations of comity, finality and judicial efficiency. The Fifth Circuit, in dismissing a mixed petition, summarized these considerations as follows:

> Our decision is based not on ad hoc factual distinctions, but on compelling precedent. By remanding for exhaustion, we respect comity, yet we also reserve our commission to draw the precious writ from its sheath if a federal judicial remedy proves necessary and proper in the final disposition of Lamberti's lamentations. Our remedy is not only technically and precedently required, it is an exercise of judicial restraint appropriate to the traditions of our revered federalism. It is a salutary rule that requires a petitioner for the writ of habeas corpus to pass through the state's curative filters before applying to the federal judicial chambers. That the request for the writ be so structured not only assures the State a power of redemption before federal judgment is brought to bear, but it also assures that our federal courts' perspective will not be blurred and obscured by an excess of petitions filed here in the first instance.

---

[12] The Second Circuit has adopted a rule which also dismisses an entire petition containing mixed claims for relief, but only when the claims are interrelated. *United States ex rel. Martin* v. *McMann,* 348 F.2d 896, 898 (2d Cir. 1965), *en banc. Accord, United States ex rel. Boyance* v. *Myers,* 373 F.2d 111, 112-113 (3d Cir. 1967); *Huwett* v. *North Carolina,* 415 F.2d 1316, 1320 (4th Cir. 1969); *Triplett* v. *Wyrick,* 549 F.2d 57, 59 (8th Cir. 1977); *Watson* v. *Patterson,* 358 F.2d 297 (10th Cir. 1966). This rule however, provides no guidance for determining when such claims are interrelated.

Lamberti v. *Wainwright*, 513 F.2d. 226, 279 (5th Cir. 1975).

1. Important interests of the State require exhaustion of all claims.

State courts are equally bound with the federal courts to enforce federal constitutional rights. *Robb* v. *Connolly*, 111 U.S. 624, 637 (1884); *Wade* v. *Mayo*, 334 U.S. 672, 679 (1948). See Tenn. Const., art. X, §1. Premature federal review of a state court conviction, however, frustrates this constitutional responsibility of the state courts. Spawned by principles of comity the exhaustion doctrine is designed to reduce the friction between federal and state courts necessarily caused when a single federal judge overturns a state conviction affirmed by its own highest court. *Ex parte Royall*, 117 U.S. 241, 251-253 (1886). Hence, the exhaustion doctrine gives a state the first opportunity to review each constitutional question. *Picard* v. *Connor*, 404 U.S. 270 (1971).

Proper application of the exhaustion doctrine directly results in the enhancement of a state's understanding of and hospitality toward federal claims. *See Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 490 (1973). Because it is the State which has expended its own resources to arrest, prosecute, convict, and provide meaningful appellate review to a prisoner it is the State which has the primary interest in assuring the finality of its criminal judgment. A prisoner should be required to exhaust *all* his federal claims in the state courts before seeking federal review. The finality of state review should be a prerequisite to the initiation of federal review.[13]

Permitting piecemeal review of mixed habeas petitions vitiates the policies underlying the exhaustion doctrine. While

---

[13] This requirement is tempered by the provision that a prisoner need only present his federal claim once to the state's highest court. *Brown* v. *Allen*, 344 U.S. 443, 448 n. 3 (1953); *Roberts* v. *LaVallee*, 389 U.S. 40, 43 (1967).

the prisoner pursues his exhausted claims in federal courts he can continue to pursue his unexhausted claims in the state courts. Inconsistent results are not unlikely. Even worse, the state courts would likely abstain from reviewing the unexhausted claims in order to prevent unnecessary decisions on federal *and* state constitutional law so long as the prisoner was still seeking relief through the federal courts.

The appellate state courts also have the important responsibility of supervising their own trial courts. Decisions of the United States Supreme Court and the state appellate courts are binding on Tennessee trial courts; such is not the case with the opinions of lower federal courts. *Bowman* v. *Henard,* 547 S.W.2d 527, 530 (Tenn. 1977). Thus, premature federal review deprives the states of an opportunity to declare controlling state precedent on matters of federal constitutional law.

Premature federal habeas review also preempts consideration of any *state* constitutional claim, particularly at a time when Tennessee has construed its own constitutional provisions more broadly than its federal counterparts.[14] Requiring exhaustion of all claims guarantees that a state will have the first opportunity to review every constitutional challenge made by a prisoner in attacking his state conviction. Significantly, such a rule would encourage a prisoner to present all his federal constitutional claims in a single proceeding and discourage him from sandbagging his federal claims in hopes of later obtaining relief in a federal forum. *See Murch* v. *Mottram,* 409 U.S. 41, 45-46 (1972); *Wainwright* v. *Sykes,* 433 U.S. 72, 89 (1977).

Further, requiring complete exhaustion of all claims gives the states an opportunity to conduct, if necessary, evidentiary hearings at an early stage when memories are fresh as to contested

---

[14] *See, e.g., Miller* v. *State,* 584 S.W.2d 758, 761 (Tenn. 1979) (ex post facto provision); *State ex rel. Anglin* v. *Mitchell,* 596 S.W.2d 779, 789 (Tenn. 1980) (non-lawyer juvenile judge).

issues of fact. Such factual findings could expedite subsequent federal habeas review. 28 U.S.C. §2254(d); *Sumner* v. *Mata*, ____ U.S. ____, 101 S.Ct. 764 (1981). Finally, requiring complete exhaustion would minimize disruption not only of a state's administration of its justice system but the prisoner's custodial status as well. *Galtieri* v. *Wainwright*, 582 F.2d 348, 360 (5th Cir. 1978).

2. The need for orderly administration of the federal courts mandates exhaustion of all federal claims.

Requiring dismissal of a petition containing mixed claims for federal habeas relief would not only eliminate piecemeal litigation of a case but would substantially increase the correctness of subsequent habeas review particularly where granting relief is dependent upon either factual conclusions or a determination of a state's procedural law.

Piecemeal review of mixed petitions for habeas relief is antithetical to judicial efficiency and the policy against fragmentary appeals. *Parr* v. *United States*, 351 U.S. 513 (1956); *Murch* v. *Mottram*, 409 U.S. 41, 45-46 (1972). A state prisoner should not be permitted to obtain a ruling on his exhausted claims while keeping the federal door ajar for a second petition containing the previous unexhausted claims. Requiring complete exhaustion would not only relieve federal courts of the burden of successive petitions, a result mandated by this Court and Congress, but also encourage litigation of the entire case in a single proceeding. *See Schneckloth* v. *Bustamonte*, 412 U.S. 218, 274 (1973) (Powell, J., concurring); *Sanders* v. *United States*, 373 U.S. 1, 28-29 (1963); Rules Governing Section 2254 Cases, 9(b), 28 U.S.C. foll. §2254.

Requiring exhaustion of all federal claims would also provide the federal courts with a complete factual record often necessary to resolve the federal claim. The factual findings could very well be determinative as to the denial of habeas relief. 28 U.S.C. §2254(d). Complete exhaustion would also produce a definitive

ruling on a state's procedural laws, thereby leaving no doubt whether a claim would be barred from habeas review due to a procedural default.[15]

3. The interests of the prisoner are not prejudiced by requiring exhaustion of all claims.

The prisoner's interest is primarily in speedy federal review. The quest for judicial efficiency is not a subterfuge designed to ease the workloads of federal judges while prejudicing the state prisoner's interests. Increasing judicial efficiency actually benefits the meritorious habeas petitioner.

> It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.

Brown v. *Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring). Similarly, the pursuit of habeas relief contemporaneously in two forums will likely discourage a prisoner by the delays caused from such judicial inefficiency.

This Court has recognized that a prisoner has a legitimate interest in prompt release from illegal incarceration. *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 490 (1973). But it is not unusul, as in the instant case, for a prisoner to slowly embark on a trek of federal habeas review when he knows the state will likely be prejudiced if the writ is granted and a new trial is

---

[15] A federal court should dismiss a mixed petition even when the state court might not address the merits of the claim due to procedural defaults. *See Carothers* v. *Rhay*, 594 F.2d 225, 228 (9th Cir. 1979) and *Vester* v. *Stephenson*, 465 F.Supp. 868, 869-879 (E.D. N.C. 1978). The case of *Hockenbury* v. *Sowders*, 620 F.2d 111 (6th Cir. 1980) is a typical example of the sticky problems which occur when a district court presumptiously interprets a state's procedural laws. The instant case is a prime example. Had Tennessee's courts reviewed the unexhausted claims, as expanded by the district court, determinative questions about procedural defaults would not be before this Court.

required. Asking a rape victim to retell the horrors of the prisoner's crimes after she has attempted to forget the events, though seared upon her mind, is sometimes asking the impossible — and the prisoner knows its.

> It is not seemly that years after a conviction when time has dulled the memories, when death has stilled tongues, when records are unavailable, convicted felons, unburdened by any handicap to a normal presentation of unfairness in their trial should be permitted to attack their sentence collaterally by habeas corpus, because of errors, known to them at the time of trial.

Wade v. *Mayo,* 334 U.S. 672, 695 (1948) (Reed, J., dissenting). *See also, Hankerson* v. *North Carolina,* 432 U.S. 233, 247 (1977) (Powell, J., concurring); *Sanders* v. *United States,* 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).

In the instant case Lundy was convicted on August 24, 1974. The state appellate process was completed on March 10, 1975. His state conviction for post-conviction relief was denied on May 3, 1976, there being no appeal therefrom. (J.A. 62). Almost three years later Lundy sought federal habeas review. (J.A. 64). Lundy's own inaction in the instant case belies any suggestion that he earnestly seeks prompt federal review of his state conviction. He cannot be heard to plead for promptness when he has done nothing himself to facilitate prompt habeas review. His deliberate bypass of available state remedies for his unexhausted federal claims demonstrates that he is more concerned about forum shopping than in obtaining prompt vindication of his federal rights.

Requiring dismissal of a petition containing mixed claims will produce one of two decisions by the prisoner: he will go back to state court or withdraw his unexhausted claims from the petition and take his chances with the exhausted claims. Pursuing

this latter alternative unsuccessfully could very likely shut the federal habeas door altogether.[16] Rules Governing Section 2254 Cases, Rule 9(a)-(b), 28 U.S.C. foll, §2254. This requirement would discourage "sandbagging" in the state courts and assure that someday the prisoner's state conviction will become final by having only one federal case which reviews his state conviction.

II.

The District Court Improperly Granted Habeas Relief On The Ground Of Prosecutorial Misconduct.

In grounds 2 and 3 of Lundy's petition for federal habeas corpus relief he complained of the following statements made by one of the prosecuting attorneys:

> 2. The remark made in support of the State's proffer of certain evidence to the effect that Lundy had a violent character;
>
> 3. The remark that the State's proof was uncontradicted.

(J.A. 72-74).

Agreeing with the State that the second remark had not been presented to the state courts, the district court nonetheless felt compelled to weigh the prejudicial effect of both remarks. Further, the district court found seventeen additional acts of alleged prosecutorial misconduct and proceeded to review the prejudicial effect of each act, though most were barred from habeas review because of Lundy's procedural defaults. The district court considered all nineteen remarks as amounting to a deprivation of Lundy's right to a fair trial. (J.A. 89-92).

---

[16] This is precisely what should happen. *See, e.g., Earl* v. *Estelle*, 503 F.Supp. 406, 408 (N.D. Tex. 1980).

However, only five of the nineteen acts of misconduct were properly objected to or subsequently presented to the state supreme court.[17]

---

[17] Of the 19 cited instances of alleged prosecutorial misconduct 14 were neither objected to at trial nor presented to the state supreme court. It is necessary to address, seriatum, each act of misconduct found by the district court in its opinion as compared to what the record actually reveals. (1) The prosecutor did not accuse the defense attorney of "illegal and unethical conduct" in front of the jury; rather, he stated that the defense attorney's pre-trial interview was "completely improper." (J.A. 7). The issue was presented to the state supreme court. (2) No objection was made to the prosecutor's statement that the rape victim was telling the truth nor was this issue presented to any state appellate court. (J.A. 7, 10). (3) The propriety of the prosecutor's statement regarding the defense counsel's method of interviewing the prosecutrix was presented to the state supreme court. (J.A. 50-15). (4) Though no objection was made to the prosecutor's assertion with regard to the proper method of interviewing a state witness such issue was nevertheless considered by the state appellate courts. (J.A. 61). (5) The prosecuting attorney's representation to the trial court that the rape victim had a right to have her counsel present at a pre-trial interview was presented to the state appellate courts. However, the prosecutor's remark that a state's attorney should have been present during the interview, as cited by the district court, was made out of the presence of the jury. (J.A. 9). (6) The prosecutor's remark that the defense counsel's pre-trial interview tactics were "inexcusable" was made out of the presence of the jury. (J.A. 12). (7) The prosecutor's reference to the denial of an intention to later file a grievance with the bar association was made out of the presence of the jury and was not presented to the state courts. (J.A. 12). (8) The prosecutor's objection to cross-examination of the rape victim, labeled by the district court as misconduct, was neither objected to nor presented to the state courts. (J.A. 7-11, 35-38, 45-48, 50-51). (9) The remark by the prosecuting attorney that "the defendant's violent nature" was material in support of the proffer of evidence was presented to the state appellate courts. (10a) No objection was made to the prosecutor's personal evaluation, during rebuttal summation, of the gravity of the crime nor was this issue presented to the state courts. (J.A. 27, 35-38, 50-51). (10b) No objection was made to the prosecutor's person evaluation of the seriousness of the offense, nor was the issue presented to the state courts. (J.A. 29). (10c) No objection was made to the prosecutor's comments that the State's evidence was uncontradicted, which is the subject of Lundy's third claim for

A. The Remark concerning Lundy's violent character was harmless beyond a reasonable doubt.

During Lundy's state trial his fourteen year old companion testified because she was an eye-witness to Lundy's crimes. In hopes of eliciting testimony that Lundy was a violent individual and capable of following through with threats he made to the rape victim, the girl was asked if she had seen Lundy mistreat the girl's sister. Objection was made on the ground of materiality. (J.A. 17). In support of the examination the prosecuting attorney stated:

> I would think the defendant's violent nature would be material to this case in light of what the victim has testified to.

(J.A. 17).

---

habeas relief; the issue was also not presented to the state courts. (J.A. 27). (10d) No objection was made to the prosecutor's personal evaluation regarding the unimportance of certain inconsistencies in the state's proof and neither was the issue presented to the state courts. (J.A. 27). (10e) No objection was made to the prosecutor's statement that he could not believe the previous remarks made by defense counsel and neither was this issue presented to the state courts. (J.A. 28). (10f) No objection was made to the prosecutor's personal evaluation of the importance of the case to the rape victim and neither was this issue presented to the state courts. (J.A. 29). (10g) No objection was made to the prosecutor's personal evaluation that the prosecutrix would not ever forget the crime nor was the issue presented to the state courts. (J.A. 29). (10h) No objection was made when the prosecutor briefly related a pre-trial conversation he had with the prosecutrix and neither was the issue presented to the state courts (J.A. 29); the district court criticized the prosecuting attorney for drawing legitimate inferences from the evidence admitted at the trial. (10i) No objection was made when the prosecutor stated his desire to personally sit on the jury and neither was the issue presented to the state courts. (J.A. 30). (10j) The prosecutor's suggestion of a standard sentence for rape was properly objected to and a curative instruction was given, but the issue was not presented to the state courts on appeal. (J.A. 30).

The objection to this line of examination was thereafter sustained by the trial court and the jury was immediately instructed to disregard the import of the State's question and the answer given thereto. (J.A. 22,23).

After a thorough review of the evidence the Tennessee Court of Criminal Appeals held:

> [I]n the context of the undisputed facts of this case we hold any error to have been harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18 . . . (1967); *Huffman* v. *State,* . . . 458 S.W.2d 29 (1970).

(J.A. 58).

What made the error harmless "beyond a reasonable doubt" were the undisputed facts. The rape victim, Sharon Murphy, testified she was enticed into Lundy's automobile by Lundy's fourteen-year-old female companion, Terri Tankersly, at Lundy's direction, on the pretext of giving the victim a ride home. She entered the car in response to an offer of a ride in the belief that the couple lived in the neighborhood. Lundy did drive her past the apartment where she was living, but refused to stop the car. The victim testified that after passing her home Lundy restrained her by grabbing her arm, subsequently ordered her to change places with the other girl by moving to the center seat position, and as they continued to drive, ordered her to remove all her clothing. The victim asked Terri Tankersly if she had to, and was given an affirmative answer. Lundy told the victim that he would knock her brains out if she did not undress. Scared and crying, Miss Murphy completely disrobed. At Lundy's direction Terri Tankersly blindfolded the victim with Miss Murphy's bra.

When the three arrived at Lundy's apartment the victim was allowed to put back on her shorts and a jacket and was led inside. Once inside the apartment Lundy ordered her to completely disrobe again, and to get upon the bed. Her blindfold was

removed at her request. Lundy also undressed. The victim asked for a drink of water, which Tankersly got for her. Lundy made her drink some whiskey from a bottle from which he was imbibing. He then ordered Miss Murphy to lie on the bed. She testified that he took her hands and held them up over her head as he commenced intercourse.

After the first act of intercourse, which apparently did not result in a sexual climax for Lundy, he ordered Terri Tankersly to put a cloth on the kitchen table. He then ordered the victim to go to the kitchen and lie upon her back upon the table, with her head hanging over the edge. He threatened to knock her brains out if she did not comply. When the victim was thus positioned, Lundy ordered Miss Murhpy to open her mouth, and "he stuck his penis down my throat." She gagged and pushed him away, at which time he viciously struck her with his fist upon the cheek, the mouth and the forehead. The victim commenced crying again. He made her lie back down and inserted his penis down her throat and moved in and out. Miss Murphy started to vomit and pushed him away again. He then struck her with his fist upon the abdomen and upon the right side. She got off the table, crying, and asked for a drink of water. His response was to make her get down on her knees while he urinated in her mouth, making her swallow most of the urine.

Lundy then ordered the victim back into the bed, already occupied by the disrobed Terri Tankersly. He first ordered Miss Murphy to insert her finger into Tankersly's vagina and manipulate it, despite Tankersly's begging him not to. After this was done he ordered Miss Murphy to suck Tankersly's vagina. When her compliance did not suit Lundy, he struck Miss Murphy twice upon the back of her head with his fist. She then performed the cunnilingus for about two minutes before becoming sick. Lundy then allowed her to stop. Terri Tankersly testified that while Miss Murphy was performing cunnilingus upon her that Lundy was "trying to have relationship with Murphy in her rear end."

Finally, Lundy had normal intercourse with the victim again, for more than thirty minutes without ever reaching a climax. He discussed tying Miss Murphy to the bed and keeping her for two or three days, and even had the other girl to tie some socks together to use as bindings. However, at the victim's suggestion, he went to sleep. Significantly, Terri Tankersly, the fourteen year old companion of Lundy and with whom he had admittedly been having sexual intercourse for years, fled the apartment as soon as Lundy was asleep. She tried to get Miss Murphy to go with her, expressing fear that Lundy was going to kill both of them; but the victim was afraid to leave at that time for fear of awakening Lundy, who had an arm and leg across her. Some two hours later when Lundy turned over, she fled the premises, hailed a passing taxi, and immediately reported having been kidnapped and raped.

These facts were deduced from the testimonies of Miss Murphy and Terri Tankersly, the defendant's post-arrest statement, the victim's fresh complaint and expert medical testimony.

The district court and court of appeals ignored these factual findings.[18] The federal courts did not explain why the state court's findings, made in accordance with *Chapman* v. *California,* 386 U.S. 18 (1967), were not entitled to deferrence by reason of 28 U.S.C. §2254(d). The district court, and court of appeals (over the State's objection), never recognized that their findings of prejudicial error on the point were directly contrary to the state court's analysis and conclusions. This was a clear violation of section 2254(d). *Sumner* v. *Mata,* ____ U.S. ____, 101 S.Ct. 764 (1981).

---

[18] Also, the district court had before it the brief which Lundy filed in the Tennessee Court of Criminal Appeals which very specifically detailed the evidence admitted at his trial. That brief reflects that there was medical evidence which also corroborated the rape victim's testimony. (J.A. 34).

B. The district court erroneously granted habeas relief for the remaining acts of prosecutorial misconduct.

Although Lundy only cited two instances of prosecutorial misconduct as grounds for habeas relief, the district court noted the existence of seventeen additional acts of alleged misconduct, most of which were characterized by the district court as testimonial misconduct of the prosecutor. In addition to the "violent character" remark, the Tennessee Court of Criminal Appeals reviewed only four other remarks and found them to have been harmless. These remarks consisted of the prosecutor's criticism of the defense counsel. The State courts never had the opportunity to review the remaining fourteen acts of alleged misconduct to determine whether they constituted prejudicial error or had been waived because of procedural defaults.

The State contends that review of the fourteen additional remarks was barred because of Lundy's failure to timely object thereto or to present them to the state courts.[19] In the absence of any finding of cause of prejudice these claims were barred from

---

[19] Tennessee has long operated under a procedural rule requiring contemporaneous objections to remarks and arguments by a prosecutor in order to seek appellate review of the prosecutor's conduct. *Edwards* v. *State*, 540 S.W.2d 641 (Tenn. 1976), *cert. denied*, 429 U.S. 1061; *Manning* v. *State*, 195 Tenn. 194, 157 S.W.2d 6 (1953). Thus, Lundy is barred from seeking federal habeas relief for at least thirteen of the fourteen acts of misconduct which were not presented to the state courts on the ground of his procedural defaults.

habeas review. *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).[20] Lundy's third claim for relief (the prosecutor's comment that the State's evidence was uncontradicted) was not presented to any state court. The district court realized this but held:

> [S]ubject to the question of exhaustion of state remedies, where there is added to the trial atmosphere the comment of the Attorney General that the only story presented to the jury was by the state's witnesses there is such a mixture of violations that one cannot be separated from and considered independently of the others.

(J.A. 93).

The district court distinguished this case from *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974), indicating that in this case the state trial judge failed to take any "special pains" to correct the prosecutor's misconduct. This ignores the fact that the trial court gave, *sua sponte*, cautionary instructions on each of the two occasions when Lundy made a contemporaneous objection to the state's closing argument. (J.A. 28, 30). The only reason more "special pains" were not taken was because of Lundy's failure to object. *See Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). The State contends that those remarks which were properly presented to the state court or even objected to at trial did

---

[20] Ignoring Lundy's procedural defaults, the lower courts evidently held that the improper remarks by the prosecutor constituted plain error. The State contends that application of a plain error rule to excuse a procedural default is contrary to the "cause" and "prejudice" test. *See Henderson* v. *Kibbe*, 431 U.S. 145, 146 (1977); *Hockenbury* v. *Sowders*, 620 F.2d 111, 114 (6th Cir. 1980). *Contra, Frady* v. *United States*, 636 F.2d 506 (D.C. Cir. 1981). The district court made no finding that cause or prejudice existed to permit habeas review.

In Lundy's federal petition for habeas relief he avered that he made no objection to the errors in grounds three and four of the petition because he was not aware that these claims amounted to constitutional violations. (J.A. 75). He has never asserted his innocence of the crimes.

not amount to egregious misconduct resulting in a denial of due process of law. *See Donnelly* v. *DeChristoforo*, 416 U.S. 637, 647-648 (1974).

III.

The District Court Erroneously Concluded That Lundy's Right Of Confrontation Was Denied When The State Trial Court Limited His Cross-Examination Of The Rape Victim.

At Lundy's state trial his counsel attempted to impeach the rape victim through evidence of prior contradictory statements allegedly made by her to the defense counsel during a pre-trial interview. (J.A. 6-7). Lundy's counsel was attempting to prove that her testimony regarding prior acts of unchastity did not fully reveal all such acts as allegedly revealed to him in the interview.

The trail court prevented Lundy's counsel from inquiring into the prior statements upon the erroneous ground that the defense counsel had failed to properly inform the witness as to counsel's role in the case. (J.A. 13). The Tennessee Court of Criminal Appeals agreed that the trial court's *reasoning* was erroneous. (J.A. 60-61).

However, the record reflects that the trial court's decision was correct because the rape victim denied, in the presence of the jury, that she recalled ever having made the statements to the defense attorney. (J.A. 7). Later, the trial court did permit Lundy's counsel to make an offer of proof out of the presence of the jury. Examination of the rape victim at the jury-out hearing reflected that Lundy could not prove that the alleged prior contradictory statements were ever made (J.A. 24-25). The Tennessee Court of Criminal Appeals held that the state trial judge's limitation upon cross-examination was harmless under the circumstances of the case and in light of the offer of proof. (J.A. 60-61). The district court, however, held that the defendant's right of confrontation was denied because "the jury had no opportunity to determine whether the witness had *made* a

conflicting statement to the defense attorney prior to trial." (J.A. 93) [emphasis added]. However, in reaching this conclusion the district court must have overlooked the record which reflects that the defense attorney was permitted to ask the rape victim whether she had made the alleged prior contradictory statement:

> Q. Miss Murphy, did you or did you not tell me on an occasion when I talked with you that you had had intercourse with Aaron Miller ten to twenty times?
>
> A. I don't remember. (J.A. 7).

The State's objection to the question and answer was overruled by the trial court although the defense counsel was not permitted to further continue this line of inquiry. The trial court's ruling, though based upon an erroneous ground, was nonetheless in accordance with Tennessee law which binds the cross-examiner to the answer given on a collateral matter such as impeachment. *McGowen* v. *State,* 221 Tenn. 442, 427 S.W.2d 555, 559 (1968). Additionally, the trial court made it clear to Lundy's counsel that this ruling did not preclude cross-examination with regard to specific acts of unchastity. (J.A. 15-16).[21]

The district court and court of appeals held that the trial court's limitation upon cross-examination operated to deny Lundy of his right of confrontation. Also, the lower federal courts impliedly rejected the state court's factual finding of harmless error without explanation. 28 U.S. §2254(d) *Sumner* v. *Mata,* ____ U.S. ____. 101 S.Ct. 764, 771 (1981).

The State contends that there was no Sixth Amendment violation. The lower court's reliance upon *Davis* v. *Alaska,* 415 U.S.

---

[21] At the time of Lundy's trial a defendant was entitled to question the rape victim with regard to her prior acts of unchastity to establish consent to the intercourse. *Guy* v. *State,* 1 Tenn. Crim. App. 266, 443 S.W.2d 520 (1969).

308 (1974) in finding constitutional error was clearly misplaced. Because of a state law the defendant in *Davis* was precluded from cross-examining a key state witness concerning his motive for testifying untruthfully.

The *Davis* court held that the trial court's limitations upon cross-examination denied the defendant his right of confrontation where the witness' previous answers were less than candid and a full cross-examination would have exposed the truth concerning the witness' motive for testifying.

Davis is clearly distinguishable from the instant case. Under state law Lundy was permitted to prove lack of chastity to negate the element of force. But the limitation upon cross-examination pertained only to a *collateral matter, i.e.*, the attempt to impeach the victim's testimony by an alleged prior contradictory statement. The jury heard the victim's denial of making the prior statement. Lundy was bound by her denial. The lower courts simply overlooked this portion of the record and, therefore, incorrectly analyzed the constitutional claims. Ironically, if the State is required to retry Lundy he would not be permitted to cross-examine the rape victim about her prior acts of unchastity, much less the alleged prior contradictory statements. Tennessee has enacted a rape shield law protecting such inquiry unless clearly material to the issue of consent. Tenn. Code Ann. §40-2445 (Supp. 1980). *See, Walters* v. *State*, 578 S.W.2d 652, 654 (Tenn. Crim. App. 1978) (no right to introduce such evidence merely because defendant testifies victim consented). *See also,* Fed. R. Evid. 412.

IV.

The Court Of Appeals Should Have Remanded The Cause For A Full And Fair Evidentiary Hearing.

The district court granted habeas relief nine days after the State timely filed its answer to the petition. With this answer the State filled only those portions of the voluminous state trial

transcript which had been specifically referred to in Lundy's petition. The district court granted habeas relief on grounds which necessarily demand review of the entire state trial transcript to determine whether or not constitutional violations were harmless beyond a reasonable doubt. *See Chapman* v. *California,* 386 U.S. 18, 22-24 (1967); *Harrington* v. *California,* 395 U.S. 250, 253-254 (1969); *Donnelly* v. *DeChristoforo,* 416 U.S. 637, 642 (1974).

Congress did not intend for federal courts to hastily grant habeas corpus relief where expansion of the record was necessary to protect the rights of all parties and to ensure a correct result. Rules Governing Section 2254 Cases, Rules 5, 7-8, 28 U.S.C. foll. §2254.[22] Ordering an expansion of the record or a hearing to permit the State to address claims not presented in the petition, though relied upon by the district court in granting relief, would have enabled the lower federal courts to properly weigh the prejudicial effect of the alleged constitutional violations in light of all the evidence presented at Lundy's state trial. Although the State did not move the district court for reconsideration in order to offer the entire state trial transcript, the district court should have *sua sponte* ordered expansion of the record. The State did request such relief before the court of appeals, which was denied.[23] Although no request for an evidentiary hearing was made in the State's answer to the petition,

---

[22] *See* Developments in the law - Federal Habeas Corpus, 83 Harv.L.Rev. 1039, 1179-1192 (1970).

[23] The request was made in the State's petition for rehearing and in two motions seeking permission to file the entire state trial transcript, which motions were denied. (J.A. 2-3).

such failure does not operate as a waiver of the right to insist upon a full and fair hearing on behalf of the State.[24]

> Respondent's failure to assert the need for an evidentiary hearing in its motion to dismiss did not necessarily deprive him of the right to assert the absence of a hearing . . . as error on appeal . . ..

Browder v. *Director, Department of Correction of Illinois,* 434 U.S. 257, 266 (1978).

The State contends that the resulting injustice caused by the district court's failure to order expansion of the record is illustrated by its rationale in granting relief. The district court held that the right of confrontation claim was aggravated by the fact that the State's evidence rested solely upon the credibility of the rape victim. However, if the district court had only reviewed the entire state transcript it would have realized that the rape victim's testimony was corroborated in all respect by another eye-witness, the defendant's confession, and other important evidence, all of which were relied upon by the Tennessee Court of Criminal Appeals. (J.A. 53-59).

However, consideration of the entire state trial transcript was not necessary in order to reach the correct result denying relief in this case. Before the district court was a thorough recitation of the evidence as set forth in the opinion of the Tennessee Court of Criminal Appeals and in Lundy's state appellate briefs. This, taken with the statutory presumption of correctness of the State's determination of the facts, would have been sufficient to deny habeas corpus relief.

---

[24] *See Aston* v. *Warden,* 574 F.2d 1169, 1171-1172 (4th Cir. 1978); *United States ex rel. Mitchell* v. *Follette,* 358 F.2d 922, 929 (2d Cir. 1966); *United States ex rel. McNair* v. *New Jersey,* 492 F.2d 1307, 1309 (3d Cir. 1974); *Willette* v. *State of Georgia,* 608 F.2d 538, 541 (5th Cir. 1979).

CONCLUSION

The State requests that the judgments of the lower courts be vacated and the petition dismissed.

Respectfully submitted,

WILLIAM M. LEECH, JR.
Attorney General
State of Tennessee

JOHN C. ZIMMERMANN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3231

Attorneys for Petitioner

Office-Supreme Court, U.S.
FILED
JUL 7 1980
ALEXANDER L. STEVAS,
CLERK

No. 80-846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE, WARDEN, *Petitioner,*

v.

NOAH HARRISON LUNDY, *Respondent.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT

D. SHANNON SMITH
1804 Carew Tower
Cincinnati, Ohio 45202
(513) 621-0442
Attorney for Respondent

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a petition for relief under 28 U.S.C. Sec. 2254 should be dismissed, without prejudice, where the petition presents several claims for relief but where one or more of the claims have not been presented to the state courts thereby failing to satisfy the exhaustion requirements of 28 U.S.C. Sec. 2254(b).

2. Whether habeas corpus relief was properly granted to the respondent on the grounds of prosecutorial misconduct.

3. Whether habeas corpus relief was properly granted to the respondent on the grounds that the state trial court limited his cross-examination of the main witness concerning prior contradictory statements about her lack of chastity.

4. Whether the district court erred by granting habeas relief without ordering expansion of the record so as to include the entire state trial transcript.*

---

*A list of all parties to the proceedings in the Court below is presented in petitioner's brief.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. When A Petition For Writ Of Habeas Corpus Under 28 U.S.C. 2254 Contains Both Exhausted And Unexhausted Claims For Relief, The Court Should Consider The Exhausted Claims While Dismissing The Unexhausted Claims	10
A. The Exhaustive Doctrine Is One Of Discretion, And A Hard And Fast Rule Dismissing Mixed Petitions Would Frustrate That Doctrine	11
B. The Exhaustion Doctrine Calls For A Balancing Of Competing Interests — Those Of The Petitioner, The State, And The Courts	12
C. If A District Court Has Reached The Merits Of A Mixed Petition, A Reviewing Court Should Review The Merits Of The Claim	17
II. The District Court Properly Granted Habeas Relief On The Ground Of Prosecutorial Misconduct	18
III. Lundy Was Deprived Of His Sixth Amendment Right Of Confrontation By The Court's Restriction Of Cross-Examination Of A Witness	21
IV. The State Requested No Evidentiary Hearing In The District Court Nor Was There Need For One	24
CONCLUSION	25

TABLE OF AUTHORITIES

CASES:	Page
Alford v. *U.S.*, 282 U.S. 687 (1931)	21
Barber v. *Page*, 390 U.S. 719 (1968)	22
Berger v. *California*, 393 U.S. 314 (1969)	22
Branden v. *30th Judicial Circuit*, 410 U.S. 484 (1973)	15
Brookhart v. *Janis*, 383 U.S. 1 (1966)	21
Cameron v. *Fastoff*, 543 F.2d 971 (2nd Cir. 1976)	11
Chambers v. *Mississippi*, 410 U.S. 284 (1973)	21
Chapman v. *California*, 386 U.S. 18 (1967)	23
Cuyler v. *Sullivan*, 446 U.S. 335 (1980)	20
Davis v. *Alaska*, 415 U.S. 308 (1974)	21
Ex parte Royall, 117 U.S. 241 (1886)	12
Fay v. *Noia*, 372 U.S. 391 (1963)	9, 12, 14
Francisco v. *Gathright*, 419 U.S. 59 (1974)	11
Galtieri v. *Wainwright*, 582 F.2d 348 (5th Cir. 1978) en banc	12, 13, 14, 17
Gonzales v. *Stone*, 546 F.2d 807 (9th Cir. 1976)	12, 14
Gooding v. *Wilson*, 405 U.S. 518 (1972)	11
Gordon v. *U.S.*, 344 U.S. 414 (1953)	22
Harrington v. *California*, 395 U.S. 250 (1969)	23
Hewett v. *North Carolina*, 415 F.2d 1316 (4th Cir. 1969)	11
Johnson v. *U.S.D.C.*, 519 F.2d 738 (8th Cir. 1975)	11
Mancusi v. *Stubbs*, 408 U.S. 204 (1972)	22
McGowen v. *State*, 221 Tenn. 442, 427 SW2d 555 (1968)	23
Meeks v. *Jago*, 548 F.2d 134 (6th Cir. 1976)	11
Miller v. *Hall*, 536 F.2d 967 (1st Cir. 1976)	11
Parker v. *Gladden*, 385 U.S. 363 (1966)	21
Pointer v. *Texas*, 380 U.S. 400 (1965)	21
Price v. *Johnston*, 334 U.S. 266 (1948)	9, 12
Smith v. *Illinois*, 390 U.S. 129 (1968)	21
Sumner v. *Mata*, ___ U.S. ___ 101 S.C. 764 (1981)	20

Table of Authorities Continued

	Page
Townsend v. *Sain*, 372 U.S. 293 (1963)	24
Tyler v. *Swenson*, 483 F.2d 611 (8th Cir. 1973)	11
U.S. ex rel Boyance v. *Myers*, 372 Fed 2d 111 (3rd Cir. 1967)	14
United States ex rel Langer v. *Ragen*, 237 F.2d 827, (7th Cir. 1956)	11
U.S. ex rel Levy v. *McMann*, 394 F.2d 402 (2nd Cir. 1968)	11, 15
United States ex rel Richardson v. *Rundle*, 461 F.2d 860, (3rd Cir. 1972)	11
United States ex rel Trantino v. *Hatrack*, 563 F.2d 86, cert. den. 435 U.S. 928 (3rd Cir. 1977)	11
Wainwright v. *Sykes*, 433 U.S. 72 (1977)	19
Whitely v. *Meachem*, 416 F.2d 36 (10th Cir. 1969)	11
Yeaman v. *U.S.*, 326 F.2d 293 (9th Cir. 1963)	24
CONSTITUTION AND STATUTORY PROVISIONS CITED	
28 U.S.C. 1254(1)	1
28 U.S.C. Sec. 2254	2, 10, 16
28 U.S.C. Sec. 2254(b)	i
28 U.S.C. 2254(c)	10
28 U.S.C. 2254(d)	20
28 U.S.C. Sec. 2254 Rules, Rule 5, Notes of Advisory Committee on Rules	17
OTHER AUTHORITIES CITED	
Habeas Petitions with Exhausted and Unexhausted Claims — 57 B.U.L. Rev. 464 (1977)	13
98 C.J.S. Witnesses, Section 401	23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-846

JIM ROSE, WARDEN, *Petitioner,*

v.

NOAH HARRISON LUNDY, *Respondent.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT

OPINIONS BELOW

The unreported and reported opinions below are presented in the joint appendix and cited in Brief of Petitioner.

JURISDICTION

Jurisdiction of this Court is based on the order of the Court granting the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, entered February 23, 1981. Jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Brief of Petitioner.

STATEMENT OF THE CASE

Noah Lundy was convicted by a jury, contrary to his pleas, of rape and crime against nature and was sentenced to terms of 120 years and 15 years, respectively, in the Tennessee State Penitentiary. (J.A. 53). Lundy's convictions were affirmed by the Tennessee Court of Criminal Appeals on August 30, 1974; the Tennessee Supreme Court denied review on March 10, 1975. (J.A. 52). Lundy then petitioned the Knox County Criminal Court, Tennessee, for post-conviction relief which was denied, after an evidentiary hearing, on May 3, 1976. (J.A. 62). No appeal was taken.

Lundy then petitioned the United States District Court for the Middle District of Tennessee, Nashville Division, for a writ of habeas corpus under the provision of 28 U.S.C. Sec. 2254 and alleged four grounds for relief; (1) that he was denied his right of confrontation during cross-examination of the prosecutrix; (2) that he was denied his right to a fair trial because of a prejudicial remark made by the prosecuting attorney to the jury to the effect that Lundy had a violent character; (3) that he was deprived of his right to a fair trial when the prosecuting attorney commented, during closing argument, that the only proof before the jury was from the State's witnesses which was uncontradicted and unrebutted; and, (4) that the trial judge improperly instructed the jury that every witness is presumed to swear the truth. (J.A. 64).

The district court granted habeas relief to Lundy on March 21, 1979, which decision was affirmed by the United States Court of Appeals for the Sixth Circuit. (J.A. 95).

At Lundy's trial the alleged rape victim, Sharon Murphy, was cross-examined before the jury as follows, which is the subject of Lundy's first claim for habeas corpus relief:

Q. So you had had intercourse with boys during 1973, is that true or not true?

A. Just Aaron Miller

Q. And you had intercourse with Danny Nipper, a boy by the name of Danny Nipper, had you not?

A. Not in the year '73. That was the year before in '72.

Q. I believe you had intercourse with Aaron Miller ten to twenty times during this period, had you not?

A. I don't remember how many times.

Q. That's what you told me previously.

A. I don't remember.

Gen. Evans: Object to what he told her previously.

The Court: Very well. I sustain the objection. You may ask her questions, Mr. Workman, but, ladies and gentlemen of the jury, you will not consider for any purpose the comment of counsel. The duty of counsel is to ask the questions and let the witness answer them. All right.

Q. Miss Murphy, did you or did you not tell me on an occasion when I talked with you that you had had intercourse with Aaron Miller ten to twenty times.

A. I don't remember.

Gen. Evans: Your Honor, I want to object to that, because I consider the conversation he had with her — this young lady — completely improper. He didn't inform her who he was . . .

Mr. Workman: What?

Gen. Evans: . . . he didn't inform her who he was, he didn't inform her who he was, he didn't tell her she had a right to have counsel present, he didn't do anything. He got her down there . . .

Mr. Workman: (Inaudible)

Gen. Evans: She's telling the truth on the stand — and he got her down there, and now he's trying to make use of that conversation, which was completely improper, and I object to any reference to that conversation or any attempt to use it to impeach on cross-examination.

(J.A. 6-7)

The prosecutor's objection to cross-examination by defense counsel was sustained by the trial court upon the erroneous ground that defense counsel failed to properly identify himself to the witness during the interview.

The Court: Very well, gentlemen, the Court is not passing on the question of ethics, it is passing on the question of admissibility of evidence, particularly on an objection that has been raised to the question put to this witness whether she did or did not tell him a certain thing during a certain conversation. It appearing to the Court that the attorney did not identify himself as to the fact that he was representing the defendant in this case, he did not make this

identification to this witness prior to putting these questions to her, that is, did not make his representation known to her prior to the time of presenting these questions to her, the Court then sustains the objection. However, counsel will be allowed to ask her other questions. I'm not cutting you off, Mr. Workman. You may ask her other questions . . .

Mr. Workman: What if I asked her something she told me about?

The Court: This is during that conversation, sir. Since you did not identify yourself as the attorney for Mr. Lundy, you will not ask her about (53) what she may have told you in that. Now, you may ask her questions about such other — such information as you have. In other words, don't refer to the conversation, but you may ask her about her prior relationship with these other individuals. I'm not cutting you off . . .

Mr. Workman: For my own direction, Your Honor, what is the authority for such? In other words . . .

The Court: The Court has just ruled . . .

Mr. Workman: For my own direction, Your Honor, what — is there a case on that?

The Court: There is now.

(J.A., 13)

On direct appeal, the Tennessee Court of Criminal Appeals held such reasoning to be erroneous but, with no explanation of its conclusion, harmless error. (J.A., 60-61)

In support of a proffer of evidence the prosecuting attorney made the following remarks before the jury, which is the subject of Lundy's second claim for relief:

> Q. Tell the jury whether or not you ever witnessed any difficulties between your sister, while she was dating the defendant, and the defendant?
>
> Mr. Workman: Your Honor, I still don't see that the materiality of this as to . . .
>
> General Gill: I would think the defendant's violent nature would be material to this case in light of what the victim had testified to.
>
> Mr. Workman: Your Honor . . .
>
> General Gill: I assume they claim that he's not this kind of person, and we're trying to show that he is. That's materiality.
>
> Mr. Workman: Your Honor, if I may finish my statement, I don't see any materiality to this case. He's charged in this case with rape and crime against nature.
>
> General Evans: Are you finished now. I will explain, Your Honor. This young lady explained in detail that one of the reasons that she reacted the way she did was because of this advice she received from this young lady. I think it's proper to show why this young lady was given the advice she was.

(J.A., 17-18)

The trial court then excused the jury from the courtroom to determine the admissibility of such examination. (J.A. 18). The defendant's objection was sustained and

the jury thereafter was instructed to disregard the prosecutor's remark. The Tennessee Court of Criminal Appeals found the prosecutor's remark to have been error; but after reviewing the evidence found the error to have been harmless beyond a reasonable doubt. (J.A. 58). The district court found the remark to have been error especially when weighed with many other acts of prosecutorial misconduct. (J.A. 91, 93). The court of appeals affirmed and said that Lundy's second claim for relief amounted to a constitutional violation warranting federal habeas relief. (J.A. 96).

During closing arguments the prosecuting attorney, in rebutting the defense counsel's summation, made the following remarks which were the subject of Lundy's third claim for habeas corpus relief:

> Now, evidently, the defendant's theory of this case is that we are to believe the minor inconsistencies in the State's proof, and, of course, the State's proof is what we are considering. The only story we've heard about what happened from 8:15 of the night of March 16th until about 4:00 in the morning of March 17th came from the State's witnesses. And we're suppose (sic) to think it's important whether or not he was asleep when we got there, whether he was covered or not covered, when the clothes were taken off, whether she was or was not held on the bed, whether or not she was forced with his hands or just suggested that she drink whiskey, and whether or not at one time at some point she had her hands somewhere on his back.

(J.A. 27)

The court of appeals held that the district court did not grant relief on this claim because it had not been presented to the state courts. (J.A. 93, 95-6).

The trial judge instructed the jury as follows, which is the subject of Lundy's fourth claim for habeas corpus relief:

> The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are the judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, for every witness is presumed to swear the truth.

(J.A. 31)

The court of appeals said that habeas relief was not granted for this claim because it was unexhausted. Lundy never objected to the instruction nor did he raise the issue on appeal.

SUMMARY OF ARGUMENT

I

There is no requirement that a Federal Court dismiss a petition for a Writ of Habeas Corpus which contains both exhausted and unexhausted claims.

Courts have repeatedly considered petitions with mixed claims, and the adoption of a hard and fast rule requiring the dismissal of such petitions would frustrate the purpose of the Writ, which is to provide a prompt and effective remedy for one who is unlawfully imprisoned.

See *Fay* v. *Noia*, 372 U.S. 391 (1963); *Price* v. *Johnston*, 334 U.S. 266 (1948). Nor would the adoption of such a rule serve either to ease the workload of the habeas courts or reduce the friction between the Federal and State Courts.

When a petitioner has presented two exhausted claims which both the District Court and the Circuit Court of Appeals have found meritorious, the presence of two unexhausted claims, which were so recognized by the lower Courts, do not call for dismissal of the petition.

II

The District Court properly granted habeas relief on the ground of prosecutorial misconduct. The District Court found that this issue had been presented to the State Courts and the exhaustion requirement had been met. The fact that each example of prosecutorial misconduct cited by the District Court had not been objected to at trial by Lundy's attorney, does not mean that the issue itself was not exhausted nor does it mean that the District Court could not consider these examples of misconduct in assessing the overall atmosphere of the trial.

III

The Trial Court's restriction of cross-examination of the State's chief witness was an unconstitutional deprivation of Lundy's Sixth Amendment right of confrontation. The jury was deprived of seeing and hearing the witness cross-examined concerning a prior statement she had made.

This was not harmless error, as had the credibility of this witness been successfully challenged before the jury, the outcome of the case could have differed greatly.

IV

The State did not request an evidentiary hearing in the District Court, nor did it request the Court to review any part of the record other than that filed by the State with its answer to the Petition for Writ of Habeas Corpus.

The Petition raised no issues of fact, only issues of law, obviating the necessity for an evidentiary hearing in the District Court.

ARGUMENT

I.

When A Petition For A Writ Of Habeas Corpus Under 28 U.S.C. 2254 Contains Both Exhausted And Unexhausted Claims For Relief, The Court Should Consider The Exhausted Claims While Dismissing The Unexhausted Claims.

There is no requirement under 28 U.S.C. 2254 that a Federal Court dismiss a petition for a Writ of Habeas Corpus which contains both exhausted and unexhausted claims for habeas relief. 28 U.S.C. 2254(c) provides that the petitioner "shall not have been deemed to have exhausted the remedies available in the Courts of the State . . . if he has the right under the law of the state to raise . . . the question presented." Thus, by the very language of the code section, the exhaustion requirement is applied, not to a petition *in toto,* but to each question presented in the petition.

A. The Exhaustion Doctrine Is One Of Discretion, And A Hard And Fast Rule Dismissing Mixed Petitions Would Frustrate That Doctrine.

The Exhaustion Doctrine permits the Federal Courts to orchestrate the timing of their review out of respect for State Courts. The demand for a rigid rule that always dismisses mixed petitions is inconsistent with that very reasoned approach. It is a misguided attempt to avoid the sort of judgment the doctrine calls for.

The majority of the Federal Circuit Courts of Appeals have held that claims in a petition of Writ of Habeas Corpus which meet the exhaustion requirement can be considered by the Court, even though other claims in the petition do not meet the exhaustion requirement. *Johnson* v. *U.S.D.C.*, 519 F.2d 738 (8th Cir. 1975); *Tyler* v. *Swenson*, 483 F.2d 611 (8th Cir. 1973); *U.S. ex rel Levy* v. *McMann*, 394 F.2d 402 (2nd Cir. 1968); *Cameron* v. *Fastoff*, 543 F.2d 971 (2nd Cir. 1976); *Hewett* v. *North Carolina*, 415 F.2d 1316 (4th Cir. 1969); *United States ex rel Langer* v. *Ragen*, 237 F.2d 827 (7th Cir. 1956); *Miller* v. *Hall*, 536 F.2d 967 (1st Cir. 1976); *United States ex rel Richardson* v. *Rundle*, 461 F.2d 860 (3rd Cir. 1972); *United States ex rel Trantino* v. *Hatrack*, 563 F.2d 86, cert. den. 435 U.S. 928 (3rd Cir. 1977); *Whitely* v. *Meacham*, 416 F.2d 36 (10th Cir. 1969); *Meeks* v. *Jago*, 548 F.2d 134 (6th Cir. 1976).

The Supreme Court has followed the procedure of considering the merits of exhausted claims while simultaneously refusing to consider unexhausted claims. *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Francisco* v. *Gathright*, 419 U.S. 59, 63-64 (1974).

The Writ of Habeas Corpus is "the fundamental instrument for safeguarding individual freedom." *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969). It was intended to provide a prompt and effective remedy when one was imprisoned unlawfully which would not become bogged down in a procedural morass. See *Fay* v. *Noia*, 372 U.S. 391 (1963); *Price* v. *Johnston*, 334 U.S. 266 (1948).

Petitioner now asks this Court to adopt a hard and fast rule that would require dismissal of petitions for habeas relief which contain a mixture of exhausted and unexhausted claims for relief and cites cases from the Fifth and Ninth Circuit Courts of Appeals in support of his position.[1] Petitioner asks the Court to use this hard and fast rule to replace the balancing of interests and appraisal of facts in each particular case that has always been demanded ever since *Ex parte Royall*, 117 U.S. 241 (1886).

B. The Exhaustion Doctrine Calls For A Balancing Of Competing Interests — Those Of The Petitioner, The State, And The Courts.

When a Court is presented with a Petition for a Writ of Habeas Corpus, it must balance the competing interests of the petitioner — prompt release from illegal confinement and preservation of his unexhausted claims; of the State — comity; and of the Courts — efficiency. By ruling on the exhausted claims and dismissing the unexhausted claims without prejudice, the petitioner's interests are protected whether or not the Court finds merit in the considered claims. The State's interest is protected, as it

[1] See *Galtieri* v. *Wainwright*, 582 F.2d 348 (5th Cir. 1978) en banc and *Gonzales* v. *Stone*, 546 F.2d 807 (9th Cir. 1976).

will have already ruled on the exhausted claims. The Court's interest is protected by disposing of the exhausted claims — they will not be left in a limbo while the State Courts consider the dismissed unexhausted claims, perhaps to no avail if there is merit in one of the exhausted claims. See *Habeas Petitions with Exhausted and Unexhausted Claims,* 57 B. U. L. Rev. 464 (1977).

The adoption of the hard and fast rule urged by petitioner would neither ease the burden on the Courts nor would it reduce friction between the State and Federal Court systems. Under such a rule, when the Federal District Court, in reviewing the Habeas Petitioner's claims, came across an unexhausted claim, it would have to dismiss the petition without prejudice, even though the Court might have already reviewed one or more meritorious claims. Then the State court would be presented with the unexhausted claims to review, which review would be a useless waste of the Court's time, as the Federal Court, upon getting the case the second time would award relief on the exhausted claims it had previously considered and found to have merit. When the case came back the second time, the Federal court would again have to read the record and documents accompanying the case. Now more time would have elapsed, the record would be more stale, and the State would have a more difficult time if it were ordered to retry the habeas petitioner.

It is perhaps for these reasons that even *Galtieri* and Gonzales do not support petitioner's stand for an unyielding rule:

> "In some circumstances, however, it is proper for Federal Courts to treat claims technically unex-

> hausted. As the Supreme Court stated in *Fay* v. *Noia,* 'The rule of exhaustion is not one defining power but one which relates to the appropriate exercize of power'." *Galtieri* v. *Wainwright,* 582 F.2d 348,354 (5th Cir. 1978).
>
> This rule is not inflexible, however. *Gonzales* v. *Stone,* 546 F.2d 807,810 (9th Cir. 1976).

Judge Hill, in his concurring opinion in *Galtieri* put the holding of that case into perspective:

> . . . both authors (of other opinions in the case) contemplate that occasions will arise when a district judge will find in a mixed petition an exhausted ground which ought to be addressed without the delay that would be occasioned by deferring the matter until other grounds had been taken through the state system. That is as it should be. *Galtieri,* Supra at 365.

Because all of the claims in this case did not meet the exhaustion requirement does not mean that the claims properly pursued should be dismissed. There is no interest of the State that overrides the need for a proper remedy for the violation of Lundy's constitutional rights. Courts have addressed this question and resolved the conflict between the exhaustion requirement and a remedy for violation of constitutional rights:

> We recognize . . . the desirability, where circumstances permit, of including all grounds for habeas in a single petition. But we think this does not outweigh the legitimate interest of a prisoner in obtaining prompt federal consideration of an adequate and properly asserted ground for relief that has been urged unsuccessfully before the state courts. *U.S. ex rel Boyance* v. *Myers,* 372 F.2d 111 (3rd Cir. 1967).

> However, where the unexhausted claims are either unrelated to the principal exhausted claim or frivolous, the desirability of including all grounds for habeas corpus in a single petition does not outweigh the interests of a prisoner in obtaining prompt federal consideration of exhausted claims. *U.S. ex rel Levy* v. *McMann,* 394 F.2d 402 (2nd Cir. 1968).

In this case, the grounds asserted in claims one and two are clearly distinct from those asserted in claims three and four.

The priorities of the interests which must be balanced in this type of situation were perhaps most clearly pointed out by this Court:

> The doctrine of exhaustion of state remedies as a pre-requisite to federal habeas corpus action is a judicially crafted instrument which reflects a useful balance between important interests of federalism and the need to preserve the Writ of Habeas Corpus as a swift and imperative remedy in all cases of illegal restraint or confinement. This doctrine cannot be used as a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes which underlie the doctrine and which called it into existence. *Braden* v. *30th Judicial Circuit,* 410 U.S. 484,490 (1973).

To hold that the District Court could not consider the exhausted claims which addressed Lundy's deprival of a fair trial because two separate claims had not been exhausted would indeed be an indiscriminate firing of the blunderbuss.

Petitioner states that adoption of a rule requiring the dismissal of petitions containing mixed claims is neces-

sary to insure the prompt handling of the claims in the Federal Courts with one hearing and to prevent the prisoners from "sand bagging" in the State Courts by holding back on some claims and preserving them for consideration at a later date by the Federal Courts in the event that their first claims are dismissed.

Lundy's petition was filed on a "form for use in applications for habeas corpus under 28 U.S.C. 2254" which states in its instructions, "your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction" (J.A. 64,66). In the body of the form there is a cautionary instruction telling the petitioner that in order to proceed to the Federal Court he must ordinarily exhaust his State Court remedies as to each ground on which he requests action by the Federal Court. It further instructs him that all grounds on which he has previously exhausted State Court remedies must be set forth in the petition if he wishes Federal relief. (J.A., 69). No where in this form does it state that the petitioner will have his exhausted claims dismissed if he sets forth any unexhausted claims in the petition. The question would arise as to whom is being sandbagged.

Petitioner would have us believe that lurking behind the prison walls are a group of people who are well enough schooled in the law and the procedures thereunder that they can carefully orchestrate the successive presentment of claims for relief to a Federal Court in such a manner that they will always have some

in reserve in case their forefront claims are denied. It is a more realistic scenario to picture in that situation a group of people unschooled in the law, unfamiliar with anything remotely connected to "the exhaustion doctrine" and who are appealing to the Courts for relief from constitutional violations as they become aware after the fact that these violations have taken place.

> . . . the exhaustion requirement is often not understood by the unrepresented petitioner. The Attorney General has both the legal expertise and access to the record and thus is in a much better position to inform the Court on the matter of exhaustion of State remedies. 28 U.S.C. Sec. 2254 Rules, Rule 5, *Notes of Advisory Committee on Rules.*

C. If A District Court Has Reached The Merits Of A Mixed Petition, A Reviewing Court Should Review The Merits Of The Claim.

At this point, both the District Court and the Sixth Circuit Court of Appeals have found constitutional error in claims which Lundy has presented to the State Courts. To require dismissal of the petition and return to the State Courts for consideration of the unexhausted claims would mean that the State Courts would have to consider and rule upon claims that have no bearing on the ultimate outcome of the case. This will gain nothing for the State Courts nor will it reduce the friction between the two Court systems.

The Court's holding in *Galtieri* v. *Wainwright*, 582 F.2d 348 (5th Cir. 1978) that if a District Court reaches the merits of the claim and an appeal is taken from its dispositional order, the Court of Appeals should review the merits of the claim, only weakens petitioner's argument

that the case supports his request for a hard and fast rule requiring dismissal of mixed petitions.

II.
The District Court Properly Granted Habeas Relief On The Grounds Of Prosecutorial Misconduct.

In his petition for Writ of Habeas Corpus, Lundy alleged as his second ground for relief that his constitutional rights had been violated by the prejudicial conduct of the Assistant Attorneys General and referred specifically to the comment of the prosecution about Lundy's "violent nature". (J.A., 72). The issue of prosecutorial misconduct had been raised and considered in the State Court of Appeals and found to be harmless error, even though "in a different case (it) could constitute prejudicial error." (J.A., 58).

The District Court properly held that the issue of prosecutorial misconduct had been presented to the State Courts and that the Exhaustion requirement had been met. It further held that the petitioner was not given a fair trial, and one of the reasons was the "flagrant prosecutorial misconduct." (J.A., 94).

The State argues that the District Court was without jurisdiction to grant relief for fourteen of the nineteen instances of prosecutorial misconduct cited in its opinion because Lundy neither objected at trial to the fourteen instances nor did he raise those issues before the State's Appellate Court, and that his failure to do so constituted a waiver of any objection to those acts. However, the

Court of Appeals found that this argument was without merit, that the cause and prejudice rule of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) did not apply as the Tennessee Courts had considered the issue of prosecutorial misconduct on the merits. (J.A., 96).

The issue is not how many instances of misconduct existed and to how many objections were lodged, but whether there was misconduct and whether the issue was preserved. It was raised and the misconduct was established and recognized by the Court of Criminal Appeals of Tennessee. The District Court in considering this claim for relief had a duty to review the record closely to find if Lundy's claim was supported by the record. The Court was considering a petition filed *pro se* by one not trained in the law on a preprinted form, which advised him to "tell your story briefly without citing cases or law." (J.A., 71). The Court discharged this duty by referring to "a substantial amount of testimony." (J.A., 89).

Petitioner argues that the District Court erroneously granted habeas relief for acts of prosecutorial misconduct which were barred because of Lundy's failure to timely object thereto or to present them in State Courts. However, this argument fails for the reason that the District Court did not grant habeas relief for each and every act of prosecutorial misconduct referred to in its opinion. The Court took great pains to point out that it would refer to the unexhausted claims and the examples thereof only collaterally in assessing the atmosphere of the trial as a whole. The District Court found that there was prosecutorial misconduct that deprived Lundy of a fair trial.

To hold that the Court in assessing the prosecutorial misconduct could look only at those instances where objections were lodged or which had been pointed out in Lundy's earlier appeals would be to ask the Court to put on blinders and ignore the overall atmosphere of the trial. Merely because the Court referred to instances of misconduct does not mean that the relief was granted for each and every act.

The Court granted relief on the grounds of prosecutorial misconduct because of the improper remark of the Assistant Attorney General concerning Lundy's "violent nature" and for his remarks concerning the actions of Lundy's defense counsel which were made in the presence of the jury. In reaching a decision as to whether the errors were harmless, the Court had no other choice than to examine the other improprieties of the Assistant Attorney General.

Petitioner argues that there were factual findings made by the State Court of appeals which were entitled to deference by reason of 28 U.S.C. 2254(d). See *Sumner* v. *Mata*, ____ U.S. ____, 101 S.Ct. 764 (1981). However, *Sumner* does not apply in this case because the District Court did not find evidentiary facts different from those found by the State Court, and the presumption of correctness afforded by 2254(d) does not extend to conclusions of law or determination of mixed questions. *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980). What the District Court did find was that the error which the State Court of Criminal Appeals found harmless was in fact not harmless.

III

Lundy Was Deprived Of His Sixth Amendment Right Of Confrontation By The Court's Restriction Of Cross-Examination Of A Witness.

Lundy was deprived of his Sixth Amendment Right of Confrontation by the refusal of the Trial Court to permit his attorney to cross-examine the state's chief witness concerning a conversation with the attorney at his office prior to trial. The Court's reason was that the attorney did not identify himself as the representative of the defendant prior to the conversation. (J.A., 13).

The denial of reasonable latitude in cross-examination is prejudicial error and it is not necessary to show that the cross-examination, if preserved, would necessarily have brought out facts tending to discredit the testimony in chief. *Alford* v. *U.S.*, 282 U.S. 687 (1931).

The right of confrontation and cross-examination is a fundamental requirement of a constitutionally fair Trial, and denial of that right is a constitutional error so great that no amount of showing of want of prejudice can cure. *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Davis* v. *Alaska*, 415 U.S. 308 (1974); *Parker* v. *Gladden*, 385 U.S. 363 (1966); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Brookhart* v. *Janis*, 384 U.S. 1 (1966); *Smith* v. *Illinois*, 390 U.S. 129 (1968).

There was a hearing on this issue conducted out of the presence of the jury. However, such a hearing would have no bearing on this issue, as the right to confront witnesses is a Trial Right, and includes both the opportunity to cross-examine and the occasion for the jury to weigh

the demeanor of the witness. *Barber* v. *Page*, 390 U.S. 719 (1968); *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972); *Berger* v. *California*, 393 U.S. 314 (1969).

The jury in this case was denied the opportunity to hear the witness cross-examined on her prior statement and to observe her demeanor when confronted with those statements. That witness whose cross-examination was erroneously restricted by the Trial Court's ruling was the alleged victim of the offenses and the State's chief witness. Had her credibility been successfully challenged on the issue of voluntariness, the outcome of the case might have differed greatly. "Where a criminal case may stand or fall on the jury's belief of one witness, his credibility is subject to close scrutiny." *Gordon* v. *U.S.*, 344 U.S. 414 (1953).

Had the complaining witness's testimony been successfully challenged and discredited by cross-examination, the State would have been left with the testimony of Lundy's one-time girlfriend, which certainly could not be construed as so overwhelming as to render the denial of cross-examination to be harmless error.

Petitioner urges that the District Court rejected the State Court's factual finding of harmless error without explanation. However, once again, as with the issue of prosecutorial misconduct, the District Court merely arrived at a different conclusion from the same facts, namely, that the restriction on cross-examination rose above the level of harmless error. This Court has held that constitutional errors affecting the substantial rights of the aggrieved party could not be considered to be

harmless. *Chapman* v. *California,* 386 U.S. 18 (1967); *Harrington* v. *California,* 395 U.S. 250 (1969).

Petitioner argues that there was no denial of confrontation because Lundy was bound to the answer given on cross-examination of the witness on the collateral matter of impeachment. It is a well stated rule that a witness may be cross-examined on prior statements which are inconsistent with testimony given on the stand. 98 C.J.S. *Witnesses,* Section 401. In the Tennessee case cited to support Petitioner's position the question objected to was asked on direct examination of the witness, not on cross-examination.[2]

As to the argument that Lundy was stuck with the witness's answer, which Petitioner erroneously terms a denial of making the statement:

> Q. Miss Murphy, did you or did you not tell me on an occasion when I talked with you that you had intercourse with Aaron Miller ten to twenty times?
>
> A. I don't remember. (J.A., 7)

Petitioner states that the State's objection to this question was overruled. However, an examination of the record shows that the objection was sustained. (J.A., 13). Thus, there was no answer given to the question for purposes of the record, the jury being presumed to follow the instruction to disregard the answer when an objection is sustained.

---

[2] *McGowen* v. *State,* 221 Tenn 442, 427 SW2d 555 (1968).

There can be no justification for the limitation of Lundy's right to cross-examine on the prior statement. This issue alone supports the grant of the Writ of Habeas Corpus by the District Court.

IV.
The State Requested No Evidentiary Hearing In The District Court Nor Was There Need For One.

The State filed an Answer to Lundy's *pro se* Petition for Writ of Habeas Corpus and attached thereto "pertinent portions of the transcripts." (J.A., 79). Neither an evidentiary hearing nor expansion of the record beyond that submitted by the State was requested, either before or after the District Court rendered its decision granting the Writ. Only after the State attempted to insert the balance of the Trial Transcript in the appendix of its brief in the Court of Appeals, resulting in its brief and appendix being struck, did the State move the Circuit Court to include the entire State transcript in its appendix, which motion was denied. (J.A., 2).

This Court has addressed the necessity for evidentiary hearings in this type of case:

> Where the facts are in dispute, the Federal Court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair hearing in a State Court . . . *Townsend* v. *Sain,* 372 U.S. 293, 312 (1963).

Since the function of an evidentiary hearing is to try issues of fact, such a hearing is unnecessary when only issues of law are raised. *Yeaman* v. *U.S.,* 326 F.2d 293 (9th Cir. 1963). Lundy's petition in the District Court pre-

sented no issue of fact; it addressed four questions of law. Therefore, a hearing was unnecessary.

In a habeas proceeding the respondent is required to furnish the portion of the transcript which he deems relevant. *Rules Governing Section 2254 cases, Rule 5.* 28 U.S.C. foll. Section 2254. Petitioner evidently at one time felt the balance of the transcript unnecessary for the consideration of the District Court in its review of Lundy's petition. Having failed to raise that issue as error in the Court of Appeals, he cannot now be heard to complain of an incomplete transcript, particularly when he states to this Court that the District Court had a thorough recitation of the evidence and did not need to consider the entire State transcript.

CONCLUSION

For the above reasons, Respondent requests the Court to affirm the decision of the lower Court.

Respectfully submitted,

D. SHANNON SMITH
1804 Carew Tower
Cincinnati, Ohio 45202
(513) 621-0442
Attorney for Respondent

Office-Supreme Court, U.S.
FILED
OCT 2 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE, WARDEN,
Petitioner,

v.

NOAH H. LUNDY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

WILLIAM M. LEECH, JR.
ATTORNEY GENERAL
STATE OF TENNESSEE
JOHN C. ZIMMERMANN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3231
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Argument	1
I. A Mixed Petition For Habeas Relief Must Be Dismissed Because Of The Exhaustion Requirement	1
A. The Exhaustion Requirement Is A Jurisdictional Limitation Upon Federal Habeas Review	3
B. The Exhaustion Requirement Does Not Permit Piecemeal Habeas Review	8
1. Allowing Review Of Mixed Petitions Actually Increases The Number of Petitions Filed	9
2. The Rule Which Dismisses Mixed Petitions Only When The Claims Are Interrelated Is Unworkable And Disregards The Principles Of The Exhaustion Requirement	10
3. Requiring Dismissal Of All Mixed Petitions Will Not Unfairly Impact Upon Meritorious Petitions	12
4. Requiring Dismissal Of Mixed Petitions Would Complement the Present Procedures For Habeas Review	13
5. Requiring Dismissal Of Mixed Petitions Will Eliminate Piecemeal Habeas Litigation	14

II. The Prosecutorial Misconduct Did Not Constitute Egregious Misconduct Such That It Deprived Lundy Of A Fair Trial 17

III. The Limitation Upon Lundy's Cross-Examination Of The Rape Victim Did Not Violate His Right Of Confrontation 18

Conclusion 20

TABLE OF AUTHORITIES

Cases Cited

Baker v. Grice, 169 U.S. 284 (1898) 2

Bounds v. Smith, 430 U.S. 817 (1977) 5

Bowen v. Johnston, 306 U.S. 19 (1939) 4

Brown v. Allen, 344 U.S. 443 (1953) 9,10,12,16

Bufalino v. Reno, 613 F.2d 568 (5th Cir. 1980) 6

Carothers v. Rhay, 594 F.2d 225 (9th Cir. 1979) 15

Cobb v. Wainwright, 609 F.2d 754, (5th Cir. 1980) 18

Connor v. Auger, 595 F.2d 407 (8th Cir. 1979) 6

Davis v. Alaska, 415 U.S. 308 (1974) 19

Davis v. Campbell, 608 F.2d 817 (8th Cir. 1979) 6

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) 17

Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807) 5

Ex parte Royall, 117 U.S. 241 (1886) 2

Fay v. Noia, 372 U.S. 391 (1963) 4

Fitts v. McGhee, 172 U.S. 516 (1899) 2,3,5

Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978).... 12,15

Hewett v. North Carolina, 415 F.2d 1316 (4th Cir. 1969) 10

Hill v. Beto, 390 F.2d 640 (5th Cir. 1968) 7

Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978) 10

Johnson v. United States District Court, 519 F.2d 738 (8th Cir. 1975) 11

Martin v. Hunters Lessee, 14 U.S. (1 Wheat.) 304 (1816) 7

Miller v. Hall, 536 F.2d 967 (1st Cir. 1976) 10,11

Minnesota v. Brundage, 180 U.S. 499 (1901) 2,13,15

Murch v. Mottram, 409 U.S. 41 (1972) 3,9

Needel v. Scafati, 412 F.2d 761 (1st Cir. 1969), *cert. denied,* 396 U.S. 861 6

New York v. Eno, 155 U.S. 89 (1894) 2

Pitchess v. Davis, 421 U.S. 482 (1975) 2,13,15

Preiser v. Rodriguiz, 411 U.S. 475 (1973) 4

Robb v. Connolly, 111 U.S. 624 (1884)..... 7

Rozell v. Estelle, 554 F.2d 229 (5th Cir. 1977), *cert. denied,* 434 U.S. 942 19

Schneckloth v. Bustamonte, 412 U.S. 218 (1973)..... 5

Shipwash v. Collins, 475 F. Supp. 1001 (W.D. Va. 1979) 11

State v. Hicks, 618 S.W.2d 510 (Tenn. Crim. App. 1981) 18

Stone v. Powell, 428 U.S. 465 (1976)..... 4

Summit v. Bordenkircher, 608 F.2d 247 (6th Cir. 1979) . 17

Sumner v. Mata, ____ U.S. ____, 101 S.Ct. 764 (1981).. 7

Swain v. Pressley, 430 U.S. 372 (1977) 5

Tyler v. Swenson, 483 F.2d 611 (8th Cir. 1973) 10

United States ex rel. DeFlumer v. Mancusi, 380 F.2d 1018 (2d Cir. 1967) 11

United States ex rel. Gockley v. Myers, 411 F.2d 216 (3d Cir. 1969) 7

United States ex rel. Graham v. Mancusi, 457 F.2d 463 (2d Cir. 1972) 7

United States ex rel. Kennedy v. Tyler, 269 U.S. 13 (1925) 2

United States ex rel. Levy v. McMann, 394 F.2d 402 (2d Cir. 1968) 10,11

United States ex rel. Lockett v. Illinois Parole and Pardon Board, 600 F.2d 116 (7th Cir. 1979) 6

United States ex rel. Trantino v. Hatrack, 563 F.2d 86 (3d Cir. 1977), *cert. denied,* 435 U.S. 928 6,10,11

Urquhart v. Brown, 205 U.S. 179 (1907)..... 2

Van Poyck v. Wainwright, 595 F.2d 1083 (5th Cir. 1979) 10

Wainwright v. Sykes, 433 U.S. 72 (1977) 14

Watson v. Patterson, 358 F.2d 297 (10th Cir. 1966) 10

Constitution and Statutory Provisions Cited

Act of Feb. 5, 1867, ch. 28, § I, 14 Stat. 385, ... 4

Act of June 25, 1948, ch. 646, 62 Stat. 967, ... 3

Rule 4, Rules Governing Section 2254 Cases, 28 U.S. Code foll. §2254 13

Rule 9, Rules Governing Section 2254 Cases, 28 U.S. Code foll. § 2254 9

Tenn. Code Ann. § 8-6-109(7) 6

Tenn. Code Ann. § 40-2445 (Supp. 1980) 19

Tenn. Const., art. X, § 1 6

28 U.S. Code § 2243 13

28 U.S. Code § 2254(b) 1,14,16

28 U.S. Code § 2254(d) 18

Other Authorities Cited

Bator, Finality and Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963) 7,9

Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605 (1981) 7

Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 30 U. Chi. L. Rev. 142 (1970) 9

Robinson, An Emperical Study of Federal Habeas Corpus Review of State Court Judgments (Office for Improvements in the Administration of Justice, U.S. Dept. of Justice, 1979) 14,15,16

Robinson, Allen & Schachatman, Federal Habeas Corpus And Its Reform: An Emperical Analysis, 13 Rut. L. J. ____, No. 2 (1981) 14

VI Wigmore on Evidence, (Chad. Rev. 1976)..... 19

Yackle, Post-Conviction Remedies, (Lawyers Co-op 1981) 10

No. 80-846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE, WARDEN,
Petitioner,

v.

NOAH H. LUNDY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

ARGUMENT

I.

A Mixed Petition For Habeas Relief Must Be Dismissed Because Of The Exhaustion Requirement.

Summary

The Respondent suggests that the exhaustion requirement of 28 U.S. Code § 2254(b) can be applied by a federal court at its discretion after balancing the competing interests between the

state and its prisoner.[1] This presumes that application of the exhaustion requirement is a matter of discretion rather than of power, as the State contends. The Respondent's contention eviscerates the exhaustion requirement as a jurisdictional limitation upon federal habeas review over state criminal proceedings.

Since Congress instituted the process of collateral review over state court convictions it is clearly within the prerogative of Congress to limit such federal review by first requiring that the prisoner resort to his state remedies:

> That [federal habeas] statute requires exhaustion of available state remedies as a pre-condition to *consideration* of a federal habeas petition . . ..
>
> * * * * * * *
>
> Under our decision in Picard v. Connor . . ., exhaustion of state remedies is required as a *prerequisite to consideration* of each claim sought to be presented in federal habeas [petitions] . . ..

Pitchess v. *Davis*, 421 U.S. 482, 486-487 (1975) [emphasis added].

The exhaustion doctrine was originally a judicially-crafted device designed to show deference to state sovereignties, giving them the intitial opportunity to rule upon a prisoner's federal constitutional claims. *Ex parte Royall*, 117 U.S. 241 (1886). Though the doctrine was originally couched in discretionary terms, *id.* at 251, it soon became apparent that the "discretion" of federal courts was illusory, for whenever the writ was granted prior to exhaustion of state remedies (and where none of the so-called special circumstances involving interference with federal

---

[1] Brief for Respondent at 12.

government operations existed) this Court reversed and ordered the petition dismissed.[2]

This exhaustion requirement was codified in 1948[3] and translated the "discretionary" exhaustion doctrine into a jurisdictional limitation on federal habeas powers. To safeguard this jurisdictional limitation, and the principles undergirding it, this Court denounced any development of the exhaustion requirement which would allow for piecemeal habeas litigation. *E.g., Murch* v. *Mottram,* 409 U.S. 41, 45-46 (1972).

Requiring exhaustion of all claims before reviewing the merits of any habeas claims does not close the federal door to the state prisoner—it merely prevents the state from being dragged through a revolving door of federal review after each individual claim is presented to the state courts. Judged by the paucity of successful habeas petitions it is obvious that it is the states which are exhausted by the present rules of application among federal courts rather than any meritorious petitioner.[4]

A. The Exhaustion Requirement is a jurisdictional limitation upon federal habeas review.

In *Fitts* v. *McGhee,* 172 U.S. 516 (1899) it was recognized that federal habeas jurisdiction over state convictions was derived solely from Congress.

---

[2] *See, e.g., Baker* v. *Grice,* 169 U.S. 284, 291 (1898); *Fitts* v. *McGhee,* 172 U.S. 516, 532 (1899); *Minnesota* v. *Brundage,* 180 U.S. 499, 500-01 (1901) (granting of writ reversed and petition ordered dismissed even though Court deemed claim of unconstitutionality of state statute an issue of great importance); *New York* v. *Eno,* 155 U.S. 89, 98 (1894); *Urquhart* v. *Brown,* 205 U.S. 179, 181 (1907). When the writ was denied without exhaustion of state remedies this Court reversed and ordered dismissal of the petition. *E.g., United States ex rel Kennedy* v. *Tyler,* 269 U.S. 13 (1925).

[3] Act of June 25, 1948, ch. 646, 62 Stat. 967, presently codified in 28 U.S. Code § 2254(b).

[4] Only 3% of these petitions are meritorious. See text accompanying n. 16, *infra.*

> Undoubtedly, the courts of the United States have the power, *under existing legislation,* by writ of habeas corpus, to discharge from custody any person held by state authorities under criminal proceedings . . . .

Ibid., at 532 [emphasis added]. *See Preiser* v. *Rodriguiz,* 411 U.S. 475, 485 (1973); *Stone* v. *Powell,* 428 U.S. 465, 474-475 (1976). The "existing legislation" referred to in *Fitts* was the Habeas Corpus Act of 1867.[3] The exhaustion doctrine, as crafted by the Supreme Court in *Ex parte Royall, supra,* later became inbedded into the overall Congressional grant of federal habeas review powers over state criminal proceedings in 1948. 28 U.S. Code § 2254(b) - (c) (1970).

The long-held view that federal habeas review power was derived solely from Congress was later brushed aside in *Fay* v. *Noia,* 372 U.S. 391 (1963). The Court, in dictum, made the misleading assertion that

> [t]he rule of exhaustion "is not one defining power but one which relates to the appropriate exercise of power." *Bowen* v. *Johnston,* 306 U.S. 19, 27 (1939).

Ibid., 372 U.S. at 420 [citation omitted]. The quotation cited, which was lifted out of context from the *Bowen* case, pertained not to exhaustion of state remedies but rather to the exercise of power by one federal court over another federal court's criminal judgment. Additionally, the *Fay* Court erroneously analogized to the *Royall* line of "exhaustion" cases which dealt only with the *discretion* of a federal court to conduct habeas review. After codification of the exhaustion requirement in 1948 this *discretion* was translated into a limitation of *power. See Fay* v. *Noia, supra,* at 455 (Harlan, J., dissenting).

---

[3] Act of Feb. 5, 1867, ch. 28, § I, 14 Stat. 385, presently codified in 28 U.S. Code § 2241.

The *Fay* Court, in an attempt to support the above quoted dicta, went on to say that federal habeas review over *state* criminal proceedings actually stemmed from the common law.

> [T]he breadth of the federal courts' power of . . . habeas corpus stems from the very nature of the writ . . ..

Fay v. *Noia, supra,* at 422 [footnoted omitted].

The *Fay* Court completely ignored prior decisions of this Court which had held that the Act of 1867 was the sole source of federal habeas jurisdiction over state criminal proceedings. *E.g., Fitts* v. *McGhee,* 172 U.S. 516, 532 (1899). As this Court observed long ago, there was no common law power of federal habeas review over criminal proceedings.[6]

> [T]he power to award the writ [of habeas corpus] by any of the courts of the United States must be given by *written law.*

Ex parte Bollman, 8 U.S. (4 Cranch) 75, 94 (1807) [emphasis added]. The State urges this Court to reject the dicta in *Fay* which has spawned the present review of mixed petitions for habeas relief among the federal courts.[7]

---

[6] *See, Schneckloth* v. *Bustamonte,* 412 U.S. 218, 255 (1973) (Powell, J., concurring) (federal habeas review for state prisoners was not available until passage of the Habeas Corpus Act of 1867). Neither did the Suspension Clause create any constitutional power in federal courts to issue the writ over state prisoners. The Clause merely prohibited Congress from suspending the issuance of a *state* writ. *See, e.g., Swain* v. *Pressley,* 430 U.S. 372, 384 (1977) (Burger, C. J., concurring); *Bounds* v. *Smith,* 430 U.S. 817, 835 (1977) (Burger, C. J., and joined by Blackmun, J., dissenting) (criticizing the dicta in *Fay* v. *Noia*). *Accord, ibid.,* at 837 (Stewart, J., dissenting); *ibid.,* at 837-838 (Rehnquist, J., dissenting).

[7] *E.g., United States ex rel Graham* v. *Mancusi,* 457 F.2d 463, 468 (2d Cir. 1972); *United States ex rel. Gockley* v. *Myers,* 411 F.2d 216, 219 (3d Cir. 1969); *Hill* v. *Beto,* 390 F.2d 640, 641 (5th Cir. 1968).

Some circuit courts have nevertheless held that a federal court *must* determine whether the exhaustion requirement has been satisfied, notwithstanding a concession by the state or the dicta in *Fay*.

> [N]either the concession nor waiver [of the exhaustion requirement] relieves the federal court of the responsibility to decide only those habeas claims which Congress has authorized it to hear under § 2254 (b).

United States ex rel. Trantino v. *Hatrack*, 563 F.2d 86, 96 (3d Cir. 1977), *cert. denied*, 435 U.S. 928.[8]

The jurisdictional limitation of exhaustion of state remedies as imposed by Congress reflects the understanding that state courts will naturally uphold and enforce the federal constitution.[9]

> [F]rom the very nature of their judicial duties they [state judges] would be called upon to pronounce the law applicable to the case in judgment. They were not to decide

---

[8] *See, e.g., Bufalino* v. *Reno*, 613 F.2d 568 (5th Cir. 1980); *Connor* v. *Auger*, 595 F.2d 407, 413 (8th Cir. 1979) *en banc*; *Davis* v. *Campbell*, 608 F.2d 817 (8th Cir. 1979); *Needel* v. *Scafati*, 412 F.2d 761, 765-766 (1st Cir. 1969), *cert. denied*, 396 U.S. 861; *United States ex rel. Lockett* v. *Illinois Parole and Pardon Board*, 600 F.2d 116 (7th Cir. 1979).

[9] State judges in Tennessee are bound under the state constitution to enforce the federal constitution. Tenn. Const., art. X, § 1. In fiscal year 1981 the Tennessee Court of Criminal Appeals decided 637 cases; 55 criminal judgments of state trial courts were reversed, and of this number 26 were reversed on federal constitutional grounds. During the same time period the Tennessee Supreme Court decided 20 criminal cases, reversing 13 judgments of state trial courts, of which 6 reversals were on federal constitutional grounds. These figures are taken from the official records of the Tennessee Attorney General who acts as the Reporter of Decisions for Tennessee appellate courts. Tenn. Code Ann. § 8-6-109(7).

> merely according to the constitution of the state, but according to the constitution, laws and treaties of the United States . . ..

Martin v. *Hunters Lessee,* 14 U.S. (1 Wheat.) 304, 340-41 (1816). *Accord, Robb* v. *Connolly,* 111 U.S. 624, 637 (1884). This judicial duty was accepted by the early colonies as a natural responsibility of all state judges.

> From the beginning it was one of the central features of our federalism that federal law *is* a part of the state law, that deciding federal questions is an intrinsic part of the business of state judges.
>
> * * * * * * * *
>
> Implicit in the whole structure [of criminal law) is the need for confidence that the state courts will conscientiously apply to a case the *whole* of the applicable law, including the federal law.

Bator, *Finality and Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 510-511 (1963) [footnotes omitted]. *See also,* Bator, *The State Courts and Federal Constitutional Litigation,* 22 Wm. & Mary L. Rev. 605, 614 (1981).

Therefore, after granting federal courts the power to review state criminal proceedings in 1867, Congress later limited that power by adding the exhaustion requirement of section 2254(b). *Cf., Summer* v. *Mata,* ____ U.S. ____, 101 S.Ct. 764, 769, n. 2 (1981) ("the 1966 amendments in §2254(d) were intended by Congress as limitations on the exercise of [habeas] jurisdiction.").

B. The Exhaustion Requirement does not permit piecemeal habeas review.

The Respondent asserts, however, that in spite of the development of federal habeas review powers Congress must have intended to permit repetitious habeas actions by permitting review of "mixed" petitions for habeas relief.[10] Respondent pleads that state prisoners should be permitted to promptly present their mixed petitions for habeas relief to the federal courts thereby allowing review of only the exhausted claims, leaving the petitioner to return later with his unexhausted claims; the prisoner then returns to federal court with the previously unexhausted claims and with perhaps even more new claims which may or may not be exhausted.

The fallacy of Respondent's position, which is followed in most federal circuits, is illustrated by its results. Permitting review of mixed petitions produces an attitude that criminal convictions are never final and that federal habeas corpus is nothing more than an endless process of piecemeal review over state criminal convictions.

> [I]t is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating the law will swiftly and certainly become subject to punishment, just punishment. Yet this threat may be undermined if at the same time we so define the processes leading to just punishment that it can really never be finally imposed at all. *A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands.* Furthermore, we should at least tentatively inquire whether an endless reopening of convictions, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders.

---

[10] Brief for Respondent at 10.

Bator, *supra,* 76 Harv. L. Rev. at 452 [emphasis added].

Did Congress intend to permit piecemeal review of state criminal proceedings by allowing review of mixed petitions as the Respondent suggests? Such is clearly repugnant to the consistent federal policy against fragmentary habeas litigation. *E.G., Murch* v. *Mottram,* 409 U.S. 41, 45-46 (1972). The statutory rule which protects the writ from being abused by repetitious filings suggests that finality is indeed a proper consideration governing habeas review of state criminal convictions. *See* Rule 9, Rules Governing Section 2254 Cases, 28 U.S. Code foll. § 2254.

1. Allowing review of mixed petitions actually increases the number of petitions filed.

Twenty-eight years ago, Justice Jackson, in his concurring opinion in *Brown* v. *Allen,* 344 U.S. 443, 532, 536 (1953), expressed deep concern over the

> floods of stale, frivolous and repetitious petitions [for federal habeas relief by state prisoners which] inundate the docket of the lower courts and swell our own.

The petitions at that time totaled 541. As Chief Judge Friendly later noted:

> If 541 annual petitions for federal habeas corpus by state prisoners were an "inundation" what is the right word for 7,500?

Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 30 U. Chi. L. Rev. 142, 144 (1970).

The inundation of habeas petitions upon federal district courts has resulted in an ad hoc application of the exhaustion doctrine which is contrary to the manner in which the exhaustion doctrine is consistently applied in this Court. Justification

for this departure among numerous federal courts is based on notions of judicial economy or of the meritorious petitioner's need for prompt federal habeas review.[11]

The number of habeas filings by state prisoners has dramatically increased since the decision in *Brown* v. *Allen, supra.* In 1980, 7,031 petitions for habeas relief were filed by state prisoners.[12] In an effort to meet this swelling tide of habeas petitions the federal courts have applied the exhaustion requirement in an inconsistent manner depending upon whether or not they want to review the merits of the petition. *See* Yackle, *Post-Conviction Remedies,* § 53, p. 235 (Lawyers Co-op 1981) (suggesting that its application is often result oriented). There are simply not enough judicial resources to properly decide whether each claim in each petition has been exhausted; it is often easier to deny the petition on the merits rather than to sort through the procedural questions presented by mixed petitions.

2. The rule which dismisses mixed petitions only when the claims are interrelated is unworkable and disregards the principles of the exhaustion requirement.

One of the methods employed by circuit courts (following the lead of the Second Circuit) in applying the exhaustion requirement to mixed petitions is to permit review only when the exhausted and unexhausted claims are not interrelated.[13] While

---

[11] Even though the Fifth Circuit seemingly has a strict rule disallowing habeas review of mixed petitions, concerns over judicial economy and promptness in the review process has been held to justify ignoring this local requirement, *See, Houston* v. *Estelle,* 569 F.2d 372 (5th Cir. 1978); *Van Poyck* v. *Wainwright,* 595 F.2d 1083, 1086 (5th Cir. 1979).

[12] 1980 Annual Report of Director of Administrative Office of the U.S. Courts, p. 62, Table 21.

[13] See *Miller* v. *Hall,* 536 F.2d 967 (1st Cir. 1976); *United States ex rel. Levy* v. *McMann,* 394 F.2d 402 (2d Cir. 1968); *United States ex rel. Trantino* v. *Hatrack,* 563 F.2d 86 (3d Cir. 1977), *cert. denied,* 435 U.S. 928; *Hewett* v. *North Carolina,* 415 F.2d 1316 (4th Cir. 1969); *Tyler* v. *Swenson,* 483 F.2d 611 (8th Cir. 1973); *Watson* v. *Patterson,* 358 F.2d 297 (10th Cir. 1966).

this approach may reflect more deference to principles of comity, it is unworkable and has led to patently inconsistent results as each court struggles to determine when habeas claims are interrelated.[14]

Searching these "interrelated claims" decisions for some certitude as to when exhausted and unexhausted claims are "interrelated" is like navigating through the Sargasso Sea. The quest for a standard definition becomes mired in the sea of inconsistency. The doctrine of interrelation, as crafted by the Second Circuit, is unworkable and actually imposes another burden upon a federal court; not only must it decide whether a claim has been exhausted but it must also decide whether the mixed claims are interrelated.

---

[14] Cf.: United States ex rel. *Levy* v. *McMann*, 394 F.2d 402 (2d Cir. 1968) (first claim that denial of due process occurred when the State called witness it knew would refuse to testify and second claim that right of confrontation was denied petitioner who could not cross-examine witness claiming privilege are not interrelated); *United States ex rel. DeFlumer* v. *Mancusi*, 380 F.2d 1018 (2d Cir. 1967) (claim of coerced confession is interrelated with claim of unconstitutionality of statute under which defendant convicted; test of interrelation is whether resolution of unexhausted claim would necessarily affect resolution of exhausted claim); *Miller* v. *Hall*, 536 F.2d 967, 969 (1st Cir. 1976) (only where remedies for the mixed claims are interrelated must the petition be dismissed, citing *DeFlumer*); *United States ex rel. Trantino* v. *Hatrack*, 563 F.2d 86, 91, n. 15 (3d Cir. 1977) (claim of competency to stand trial and aid in one's defense are not interrelated with claims of ineffective assistance of counsel and denial of exculpatory evidence pertaining to plaintiff's regime of drugs given to him prior and during trial which affected his ability to aid in his defense); *Johnson* v. *United States District Court*, 519 F.2d 738 (8th Cir. 1975) (per curiam) (claim of voluntariness of guilty plea is interrelated with claim of ineffective assistance of counsel and claim of lack of mental competence at trial); *Shipwash* v. *Collins*, 475 F. Supp. 1001 (W.D. Va. 1979) (unexhausted claim of defective jury instruction on presumption is not interrelated with claim of prosecutorial misconduct regarding same inference).

3. Requiring dismissal of all mixed petitions will not unfairly impact upon meritorious petitions.

Through those decisions permitting habeas review of mixed petitions is weaved a common thread: many federal courts resist the proper application of the exhaustion rule on the ground that the delay is unfair to the meritorious petitioner who should be entitled to prompt federal review of his habeas corpus claims.[15] This approach puts the cart before the horse and ignores the reality that very few petitions are indeed meritorious.

The following table[16] reflects the number of successful habeas petitions over the past three fiscal years and demonstrates that finding the meritorious petitioner is indeed like searching the "haystack for a needle". *Brown* v. *Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

Fiscal Years	No. of § 2254 Cases Decided by District Courts	No. of Cases Decided in Favor of Prisoner	% Successful
1979	6,648	228	3.43%
1980	6,599	220	3.33%
1981	7,302	250	3.42%

These figures are similar to the success rates noted in *Brown* v. *Allen*, 344 U.S. 443, 537, n. 11 (1953) (1946 - 2.8%; 1952 -1.8%).

---

[15] *See, Galtieri* v. *Wainwright*, 582 F.2d 348, 373 (5th Cir. 1978) (Goldberg, J., dissenting).

[16] These statistics were secured from the Director of the Administrative Office of the U.S. Courts upon request by the undersigned Assistant to the Tennessee Attorney General.

The above statitstics refute the Respondent's argument that requiring exhaustion of all claims as a pre-condition to federal habeas review will constitute "an indiscriminate firing of the blunderbuss." Brief for Respondent at 15. After all, was it a "firing of the blunderbuss" when this Court reversed the granting of the writ for lack of exhaustion after the lower court had declared as unconstitutional the statute under which the prisoner had been convicted, *Minnesota* v. *Brundage,* 180 U.S. 499, 500-01 (1901); or when this Court reversed the granting of a writ for lack of exhaustion when the lower courts found that the prisoner had been denied certain exculpatory evidence prior to trial, *Pitchess* v. *Davis,* 421 U.S. 482, 486-87 (1975)? When 97% of all petitions are without merit can it be seriously argued that requiring complete exhaustion of state remedies for all claims will have a severe impact upon state prisoners?

4. Requiring dismissal of mixed petitions would complement the present procedures for habeas review.

Requiring dismissal of a "mixed" petition would fit neatly within the overall scheme of existing habeas review procedures enacted by Congress and declared by this Court. This would provide a much needed rule of procedure to federal judges and magistrates who are presently struggling over the appropriate method for reviewing mixed petitions. Such a rule does not close the federal courthouse door to state prisoners—it merely keeps the door from revolving continuously for the same prisoner.

Before reviewing the *merits* of a habeas petition, a federal court should proceed through the following steps:

> 1. the claims for habeas relief should be dismissed *sua sponte,* unless they constitute claims which are cognizable on habeas corpus;[17]

---

[17] 28 U.S. Code § 2243; Rule 4, Rules Governing 2254 Cases, 28 U.S. Code foll. § 2254.

2. the petition should be dismissed if the exhaustion requirement has not been satisfied as to *all* cognizable claims unless compliance has been properly excused;[18]

3. these cognizable claims which have satisfied the exhaustion requirement should be dismissed if the claims have been forfeited under state law.[19]

Only when the above procedures have been followed should a federal court review the merits of a habeas petition.

5. Requiring dismissal of mixed petitions will eliminate piecemeal habeas litigation.

If a federal court would only strictly and consistently adhere to the above jurisdictional limitations as imposed by Congress the repetitious habeas litigation which now besets the federal courts could be eliminated. In a 1979 report commissioned by the United States Department of Justice[20] [hereafter 1979 Justice Department Report] it was found that in those federal district courts surveyed[21] which strictly enforced the exhaustion

---

[18] 28 U.S. Code § 2254(b), (c).

[19] *See Wainwright* v. *Sykes,* 433 U.S. 72 (1977).

[20] P. Robinson, An Emperical Study of Federal Habeas Corpus Review of State Court Judgments (Office for Improvements in the Administration of Justice, U.S. Department of Justice 1979). Professor Robinson's findings in this report are further analyzed in the upcoming article, Robinson, Allen & Schachatman, *Federal Habeas Corpus And Its Reform: An Emperical Analysis,* 13 Rut. L. J. ____, No. 2 (1981), where he concludes from the data that strict enforcement of the exhaustion requirement causes prisoners to resort to state courts before seeking federal relief.

[21] The district courts surveyed in the 1979 report were the Eastern District of Pennsylvania, District of New Jersey, Eastern District of Virginia, Northern District of Illinois, Central District of California and Southern District of California.

requirement the number of procedurally defective filings was actually *reduced.*[22] These findings refute the arguments of critics who claim that state prisoners are somehow too ignorant to understand that state review of their federal claims is a precondition to federal habeas review. *See, e.g., Galtieri* v. *Wainwright,* 582 F.2d 348, 369 (5th Cir. 1978) (Goldberg, J., dissenting). The simple message declared in those federal district courts which strictly and consistently enforce the exhaustion doctrine is understood by prisoner and lawyer alike: first present all your claims in the state court or you will always have your federal habeas petition dismissed.

Ironically, the concerns for judicial enonomy which cause some federal courts to prematurely review the *merits* of "mixed" habeas petitions actually spawn and multiply the filing of defective petitions.[23] Even worse, in those federal circuits which require total exhaustion of all habeas claims the rule is undercut by permitting appellate review on the *merits* where the district court has erroneously reviewed the merits of the "mixed" petition.[24] This shortsighted approach, urged by the Respondent, no doubt encourages a district court to ignore the exhaustion requirement and proceed with reviewing the merits of a habeas petition when it knows that it will not be reversed on the procedural point. It is like acceding to the cries of a child to avoid the temporary pain of immunization--in the short run the choice brings temporary relief, but in the long run the disease is certain to rear its ugly head, sometimes proving to be fatal.

---

[22] Robinson, *supra* note 20, at 20, n. 20.

[23] *Ibid.*

[24] *See Carothers* v. *Rhay,* 594 F.2d 225, 228-229 (9th Cir. 1979); *Galtieri* v. *Wainwright,* 582 F.2d 348, 362 (5th Cir. 1978) *en banc.* This standard of appellate review is in complete derogation of this Court's own precedents *E.g., Minnesota* v. *Brundage,* 180 U.S. 499 (1901); *Pitchess* v. *Davis,* 421 U.S. 482 (1975).

As the 1979 Justice Department Report illustrates, the ugly head of piecemeal habeas litigation will continue to rise unless the exhaustion requirement is strictly and consistently enforced as a pre-condition to federal habeas review. Contrary to the single "question" petitions which were prevalent in 1948, mixed petitions are now the norm in habeas litigation. The report found that 78.2% of the petitions surveyed had more than one claim while more than 50% of the petitions contained three or more claims for habeas relief.[25] Although Congress used the term "question" in requiring exhaustion of state remedies, such term cannot be interpreted so as to allow review of mixed petitions, a result Congress could not have contemplated in 1948. Nothing in § 2254(b), the state of the law at the time of its adoption, or the historical uses of the term "question" compels a conclusion that Congress envisioned and intended this result.

When a federal court ignores the exhaustion requirement and prematurely reviews a mixed petition a tremendous burden is also imposed upon the states. In these cases states are routinely called upon to produce copies of state trial transcripts and appellate pleadings in order to permit federal review of habeas petitions, a burden noted in the 1979 Justice Department Report.[26] Allowing review of mixed petitions particularly aggravates this burden because review of even one exhausted claim (*e.g.*, sufficiency of evidence) requires production of the entire transcript and defense by the state of the entire case.[27]

---

[25] Robinson, *supra* note 20, at 11.

[26] Robinson, *supra* note 20, at 22.

[27] *See, e.g., Brown* v. *Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring). It was because of this burden that the petitioner only filed a portion of the multi-volume state trial transcript since the habeas petition referred to specific portions of the trial transcript dealing with the four claims of habeas relief. (J.A. 71-75).

The impact of this case upon the present federal habeas review process will be great, indeed. Lower federal courts should be given specific directions from this Court as to the proper disposition of mixed petitions in such away that the exhaustion requirement will not become evicerated. A bright-line rule requiring dismissal of mixed petitions is a natural and logical extension of the exhaustion requirement which is a jurisdictional limitation upon the powers of federal courts.

II.

The Prosecutorial Misconduct Did Not Constitute Egregious Misconduct Such That It Deprived Lundy Of A Fair Trial.

Lundy's second claim for habeas relief was based on the prosecuting attorney's statement to the trial judge that certain testimonial evidence was being offered to prove Lundy's "violent nature". (J.A. 17, 72). The district court expanded this claim to include numerous other instances of prosecutorial misconduct which had never been fairly identified or presented to the Tennessee courts. Brief for Petitioner at 25. The Respondent argues that the Tennessee courts considered the issues of prosecutorial misconduct. Brief for Respondent at 19. However, this ignores the fact that the only acts of prosecutorial misconduct which were identified and fairly presented to the state courts consisted of the "violent nature" remark as well as those remarks concerning the respondent's trial counsel. (J.A. 43-48, 58, 60-61).

The State contends that the Court of Appeals erroneously applied the standard of federal *supervisory* review rather than the very limited scope of habeas review delineated by this Court in *Donnelly* v. *DeChristoforo,* 416 U.S. 637 (1974). A different panel of the Sixth Circuit Court of Appeals acknowledged this difference in *Summit* v. *Bordenkircher,* 608 F.2d 247, 253, n. 4 (6th Cir. 1979) and held that a state prosecutor's disparaging remarks about the character of the accused were not per se un-

constitutional, though noting that the same remarks would be tantamount to reversible error under the court's supervisory powers. *See, e.g., Cobb* v. *Wainwright,* 609 F.2d 754, 755 (5th Cir. 1980) ("*Donnelly* teaches that in a Section 2254 proceeding more than undesirability or even 'universal condemnation' must be shown.").

What the Respondent ignores when he claims that the "violent nature" remark impaired his right to a fair trial is that the state trial judge quickly instructed the jury to disregard the remark. (J.A. 23). The remark was isolated, immediately cured by cautionary instructions to the jury, and occurred during a point in the trial where the defense counsel had adequate opportunity to militate its effect. These are the factors, among others, which justified the conclusion of the Tennessee Court of Criminal Appeals that the remark was harmless beyond a reasonable doubt. (J.A. 58). The Court of Appeals erred by failing to discuss why these factors were insufficient to render the remark harmless. *See* 28 U.S.C. § 2254(d).

The state contends that its courts are clearly capable of deciding when prosecutorial misconduct violates one's federal constitutional rights, as the case of *State* v. *Hicks,* 618 S.W.2d 510 (Tenn. Crim. App. 1981) illustrates. The cavalier attitude of federal courts towards the factual findings of harmless error by state courts derogates the jurisdictional limitations imposed by Congress.

III.

The Limitation Upon Lundy's Cross-Examination Of The Rape Victim Did Not Violate His Right Of Confrontation.

The Respondent's objections to the state trial judge's limitation upon his right to cross-examine the rape victim is based upon a purely hypothetical result. Brief for Respondent at 22. He theorizes that had the state trial court permitted his fruitless

cross-examination he might have successfully discredited the rape victim's testimony and seriously impaired the strength of the State's case. This ignores the fact that the record clearly reveals that the line of examination (whether the rape victim had made contradictory statements to the defense counsel in a pretrial interview about her previous acts of unchasity) was fruitless. The rape victim testified, in the presence of the jury, that she could not recall making the alleged prior contradictory statements. (J.A. 7). As noted by the Respondent the State's objection to this question was sustained, but the tenor of the ruling reflects that the trial court was only addressing the form of the question and not the substance of the victim's answer.

Even assuming *arguendo* that the rape victim's answer to the foundation question was not properly before the jury, the Court of Appeals should not have ignored the other portions of the record where the state trial judge permitted the defense counsel, during a jury-out hearing, to pursue this fruitless line of examination. (J.A. 24-25). The jury-out hearing reflects that the defense counsel could not make the *foundation* answers relevant because he could not prove the ultimate fact, *i.e.*, that the contradictory statements were made. *See* VI *Wigmore on Evidence,* § 1871 (Chad. Rev. 1976).

If Lundy is to be granted a retrial it is clear that this collateral examination will not be admissible under present state evidentiary law, which now protects a rape victim from being examined concerning prior acts of unchasity. Tenn. Code Ann. § 40-2445 (Supp. 1980). Such rape shield statutes have been upheld as not being violative of the constitutional right of confrontation. *E.g., Rozell* v. *Estelle,* 554 F.2d 229 (5th Cir. 1977), *cert. denied,* 434 U.S. 942 (holding that *Davis* v. *Alaska,* 415 U.S. 308 (1974) is inapplicable). If the ultimate facts (lack of chastity) could not be proved on retrial it is obvious that the alleged contradictory statements about the same would likewise be inadmissible.

CONCLUSION

The State of Tennessee requests that the judgments of the lower courts be vacated and the petition be dismissed.

Respectfully submitted,

WILLIAM M. LEECH, JR.
Attorney General
State of Tennessee

JOHN C. ZIMMERMANN
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-3231

Attorneys for Petitioner

Office-Supreme Court, U.S.
FILED
MAY 15 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-846

In the Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE, WARDEN, PETITIONER

v.

NOAH H. LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

GEORGE W. JONES
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The United States will discuss the following question, which constitutes a restatement of Question 2 in the certiorari petition:

Whether a prisoner collaterally attacking his conviction may be granted relief on the basis of instances of alleged prosecutorial misconduct neither objected to at trial nor raised on direct appeal, without showing "cause" for the failure to make timely objections and "prejudice" resulting from the alleged errors.

TABLE OF AUTHORITIES

Page

Cases:

Bihn v. *United States*, 328 U.S. 633 12

Davis v. *United States*, 411 U.S. 233 ..... 4, 8

Estelle v. *Williams*, 425 U.S. 501 ..... 8, 11

Fay v. *Noia*, 372 U.S. 391 14

Francis v. *Henderson*, 425 U.S. 536 ..... 4, 8

Harrison v. *State*, 532 S.W.2d 566 13

Hawkins v. *State*, 543 S.W.2d 606 13

Henderson v. *Kibbe*, 431 U.S. 145 13

Kirby v. *State*, 214 Tenn. 296, 379 S.W.2d 780 11

Manning v. *State*, 500 S.W.2d 913 13

Manning v. *State*, 195 Tenn. 94, 257 S.W.2d 6 11

McDonald v. *State*, 512 S.W.2d 636 13

Parton v. *State*, 445 S.W.2d 645 11

Pulley v. *State*, 506 S.W.2d 164 13

Sneed v. *State*, 546 S.W.2d 254 11

State v. *McKinney*, 603 S.W.2d 755 10

Stone v. *Powell*, 428 U.S. 465 ..... 13, 14

Sumner v. *Mata*, No. 79-1601 (Jan. 21, 1981) 14

Sunal v. *Large*, 332 U.S. 174 14

Taylor v. *Harris*, 640 F. 2d 1 ..... 8, 15

Page

Cases—(Continued):

Tyler v. *Phelps*, No. 79-3093 (5th Cir. Apr. 27, 1981) 12

Ulster County Court, New York v. *Allen*, 442 U.S. 140 15

United States v. *Addonizio*, 442 U.S. 178 13

United States v. *Frady*, 636 F. 2d 506, petition for cert. pending, No. 80-1595 (filed Mar. 20, 1981) 2, 9

United States v. *Indiviglio*, 352 F. 2d 276, cert. denied, 383 U.S. 907 1

Wainwright v. *Sykes*, 433 U.S. 72 .... 4-5, 8, 9, 15

Yakus v. *United States*, 321 U.S. 414 8

Statutes and rules:

28 U.S.C. 2254 ..... 3, 4, 5, 8, 12

Rules Governing Section 2254 Cases in the United States District Courts (28 U.S.C. 2254 note):

Rule 9(a) 9

Rule 11 12

28 U.S.C. 2255 8

Tenn. Code Ann. (repl. 1975):

§ 39-707 2

§ 39-3701 2

§ 40-3801 *et seq.* 2

Page

Statutes and rules—(Continued):

Fed. R. Crim. P.:
Rule 12 ..... 1, 8
Rule 30 1
Rule 52(b) 1, 4, 12, 13
Fed. R. Evid. 103(a)(1) 1
Tenn. Code Ann., Court Rules (Vol. 5A) (repl. 1977):
Sup. Ct. R.:
Rule 14(4) 10, 13
Rule 14(5) 11, 13
Crim. App. Ct., Rules of Practice 10
Tenn. R. App. P., *reprinted in* Tennessee Rules of Court-1980:
Rule 3(e) 11
Rule 36(a) 11
Tenn. Sup. Ct. R. Amendments, 610 S.W.2d No. 4 (Tenn. ed. Mar. 17, 1981) 11

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-846

JIM ROSE, WARDEN, PETITIONER

v.

NOAH H. LUNDY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case raises an important question concerning the availability of federal habeas corpus relief when a defendant has failed to comply with legitimate procedural rules requiring that objections be raised in a timely fashion or be deemed waived. The Federal Rules of Criminal Procedure expressly provide that certain types of motions and objections must be made at or before trial. See Fed. R. Crim. P. 12, 30; see also Fed. R. Evid. 103(a)(1). More generally, a criminal defendant's failure to make timely objection in the trial court is frequently held to bar assertion of error on direct appeal, *e.g.*, *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966),

although an appellate court may sometimes notice plain errors affecting substantial rights (Fed. R. Crim. P. 52(b)). The standard for determining whether errors not duly objected to at trial or raised on direct appeal can nevertheless support collateral relief is an issue of substantial importance to the administration of justice in the federal system. See, *e.g.*, *United States* v. *Frady*, 636 F. 2d 506 (D.C. Cir. 1980), petition for cert. pending, No. 80-1595 (filed Mar. 20, 1981).

Contrary to the assumption of the court of appeals in this case (Pet. App. A-3), most of the asserted errors relied on by the district court were neither raised nor considered in the state court proceedings and, indeed, would have been barred from consideration on direct appeal by the Rules of the Tennessee Court of Criminal Appeals. If this Court reaches the second question presented for review in the petition for certiorari, it will consider an issue that is of substantial importance to the administration of criminal justice in both federal and state proceedings.

STATEMENT

Following a jury trial in the Knox County Criminal Court in Knoxville, Tennessee, respondent was convicted of rape, in violation of Tenn. Code Ann. § 39-3701 (repl. 1975), and a crime against nature, in violation of Tenn. Code Ann. § 39-707 (repl. 1975). Respondent's motion for a new trial was denied. He was sentenced to a term of 120 years' imprisonment on the rape conviction and five to 15 years on the crime against nature conviction, the sentences to run consecutively (Pet. App. A-15). The Tennessee Court of Criminal Appeals affirmed the convictions (*id.* at A-14 to A-23), and the Tennessee Supreme Court denied review (*id.* at A-24). Respondent then sought post-conviction relief in the state trial court (see Tenn. Code Ann. § 40-3801 *et seq.* (repl. 1975)), which was denied after a hearing (J.A. 62-63).

Next, respondent filed a petition for federal habeas corpus (28 U.S.C. 2254) in the United States District Court for the Middle District of Tennessee, asserting four grounds for relief: (1) that the state trial judge had violated his rights under both the federal and Tennessee Constitutions by limiting cross-examination of the victim (J.A. 71); (2) that the prosecutor's comment concerning respondent's "violent nature" and the prosecutor's attempt to introduce evidence to that effect violated his right to a fair trial (J.A. 72-74); (3) that the prosecutor improperly commented on his failure to testify (J.A. 74); and (4) that the trial court's instructions to the jury violated his right to due process (J.A. 74-75). Because the third and fourth claims had never been raised in any state court, the district court stated that it would (Pet. App. A-7) "not consider them in the constitutional framework," but added that "in assessing the atmosphere of the cause taken as a whole these items may be referred to collaterally" (*ibid.*).

The district court apparently accepted the state court of appeals' conclusion that the limitation on cross-examination of the victim had been erroneous but, without discussion, rejected that court's conclusion that respondent had suffered no prejudice and that the error was "harmless in the context of this case" (Pet. App. A-22 to A-23). The district court did not directly address respondent's contention that the limitation on cross-examination violated his constitutional rights. Instead, after specifying a number of remarks by the prosecutor that it deemed improper, the court concluded (*id.* at A-12): "Under the charge as given, the limitation of cross-examination of the victim, and the flagrant prosecutorial misconduct this court is compelled to find that petitioner did not receive a fair trial, his Sixth Amendment rights were violated and the jury poisoned by the prosecutorial misconduct." Much of the "flagrant prosecutorial misconduct" relied on by the district court was neither

objected to at trial nor challenged on direct appeal (or, indeed, even raised in the Section 2254 petition).

On appeal, the Sixth Circuit affirmed, rejecting, *inter alia*, Tennessee's contention that *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), barred relief. According to the court of appeals (Pet. App. A-3), "the state courts of Tennessee did not apply any Tennessee state contemporaneous objection rule * * * but * * * proceeded to consider [the claims] on the merits."

SUMMARY OF ARGUMENT

Contrary to the assumption of the court of appeals, much of the prosecutorial misconduct relied on by the district court was never challenged in or considered by any state court. The district court's decision, therefore, apparently rests upon the notion that some variant of the "plain error" doctrine (see Fed. R. Crim. P. 52(b)) is applicable on collateral attack.

This Court's decisions in *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), *Francis* v. *Henderson*, 425 U.S. 536 (1976), and *Davis* v. *United States*, 411 U.S. 233 (1973), have established "cause and prejudice" as the appropriate standard for determining when a federal court may consider claims of error on collateral attack, notwithstanding a petitioner's failure to make timely objection in accordance with legitimate procedural rules. Application of the "plain error" doctrine on collateral attack is wholly inconsistent with the "cause and prejudice" standard and effectively frustrates the salutary policies that support contemporaneous objection rules.

Rules requiring a criminal defendant to make timely objection to claimed trial errors or forego the claims contribute significantly to the finality of criminal convictions and assume that the trial is the "main event" rather than a "tryout on the road" (*Wainwright* v. *Sykes*, *supra*, 433 U.S.

at 90). Even on direct appeal, contemporaneous objection requirements should not be lightly discarded in view of the important role they perform in our adversary system. A timely objection will often serve to prevent the occurrence of error, to avoid repetition of similar errors during the remainder of a trial, or to prompt the giving of a curative instruction that would reduce the impact of any error that has occurred. The reluctance to set aside a criminal conviction on the basis of error that was not objected to at trial is even more appropriate on collateral attack than on direct appeal, since collateral attacks are usually adjudicated long after the initial trial, when reprosecution may be impossible.

In a proceeding under Section 2254, a federal habeas court may consider only those claims that were actually decided by the state courts or those claims that were properly preserved. Even if the state appellate courts could have exercised discretion to ignore a procedural default on direct appeal, a federal habeas court may consider claims that were not seasonably raised and preserved at trial only if the petitioner demonstrates both "cause" for his default and actual prejudice. The concept of "plain error" simply has no appropriate application on collateral attack.

ARGUMENT

COLLATERAL RELIEF FROM A CRIMINAL CONVICTION MAY NOT ORDINARILY BE GRANTED ON THE BASIS OF TRIAL ERRORS TO WHICH NO OBJECTION WAS MADE, IN THE ABSENCE OF A SHOWING OF "CAUSE" FOR THE FAILURE TO MAKE OBJECTION

1. In a somewhat opaque opinion that does not entirely make clear the grounds for decision, the district court has set aside respondent's conviction on account of various instances of alleged prosecutorial misconduct during the trial. Ten instances of misconduct are specified (Pet. App. A-8 to A-11). Seven of these—paragraphs (1) and (3)

through (8)—all relate to the prosecutor's assertion at trial that it had been improper for defense counsel to interview the rape victim without disclosing to her that he was respondent's attorney. This objection by the prosecutor, which the state appellate court held to have been unfounded, led to the erroneous restriction of defense cross-examination regarding the prosecutrix's prior "inconsistent" statements to the attorney. The Tennessee Court of Criminal Appeals held this error to have been harmless in the circumstances of the case (Pet. App. A-23).

The district court also specified, in paragraph (9) (Pet. App. A-9), the prosecutor's statement in the presence of the jury referring to respondent's "violent nature." This statement was made in connection with the prosecution's unsuccessful attempt to introduce evidence regarding the relationship between respondent and the sister of a prosecution witness. Objection was made and sustained to the materiality of the proffered evidence, but the trial court denied respondent's motion for a mistrial because of the prosecutor's comment (J.A. 16-23). The prosecutor's comment was assigned as error on appeal (J.A. 43-45), but the court, while agreeing that the comment was improper, found the error to be harmless beyond a reasonable doubt (Pet. App. A-20).[1]

---

[1] In his brief in the Tennessee Court of Criminal Appeals, respondent asserted (J.A. 46) that "it becomes apparent from looking at the record as a whole that there was a certain amount of misconduct engaged in by the State's counsel." But, as noted above, the only specific misconduct mentioned (J.A. 46-48) was the prosecutor's assertion that it was improper for defense counsel to interview the victim without identifying himself as the attorney for respondent or having a member of the prosecutor's office present and the prosecutor's comment concerning respondent's "violent nature" (J.A. 43-45).

Respondent's petition for review in the Tennessee Supreme Court included the following statement (J.A. 50): "Petitioner would ask the court to review those parts of this record involving statements by [the]

Finally, in paragraphs (2) and (10), the district court identified 11 other statements by the prosecutors, one during the taking of testimony and the others during closing argument, that the court held to constitute improper "testimony" by the prosecutor. With one exception, no objection was made at trial to any of these prosecutorial comments, nor do they appear to have been assigned as error or addressed by the state appellate courts.[2]

Since the federal district court, in granting collateral relief, did not consider the correctness of the state appellate court's harmless error findings with regard to those instances of prosecutorial impropriety that were challenged on direct appeal, we infer that the grant of relief was predicated in substantial part upon the findings of improper prosecutorial comment contained in paragraphs (2) and (10). We assume for purposes of this brief that the district court was correct in concluding that the comments were improper, and we further assume that, had timely objection been made and the claim raised on appeal, respondent would have been entitled to reversal of his conviction on federal constitutional grounds (although we believe a harmless error conclusion might still have been sustainable). Our submission is that, in light of the procedural default under Tennessee practice brought about by the failure to object, federal collateral relief is barred unless the "cause and prejudice" standard enunciated by this Court in prior cases has been satisfied.

Attorney General upon making Motions, attempting to offer proof which was without question inadmissible and particularly following the objection to cross-examination of the prosecutrix and during the final argument." The Tennessee Supreme Court's denial of review is obviously not a ruling on the merits of respondent's general assertion of error.

[2]Respondent did object to the comment specified (Pet. App. A-11) as (j) in the district court's decision. The objection was sustained and the jury immediately instructed to disregard the statement (*ibid.*). This ground was not, however, assigned as error on direct appeal.

2. This Court has held that a failure to make timely objection, which results in a waiver of the claim on direct appeal under legitimate procedural rules, also bars the claim on collateral attack pursuant to 28 U.S.C. 2254 and 2255, unless the petitioner establishes sufficient "cause" for his failure to make timely objection and "actual prejudice." See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Davis* v. *United States*, 411 U.S. 233 (1973); cf. *Yakus* v. *United States*, 321 U.S. 414, 444 (1944);[3] see also *Taylor* v. *Harris*, 640 F. 2d 1 (2d Cir. 1981). Although the "cause and prejudice" standard announced in *Davis* has its origins in Fed. R. Crim. P. 12, it has been "incorporated directly into the body of law governing the availability of federal habeas corpus review." *Wainwright* v. *Sykes, supra*, 433 U.S. at 85; see *Francis* v. *Henderson, supra*, 425 U.S. at 542.

Substantial policy considerations underlie procedural default rules. First and foremost, the making of a timely and adequately explicated objection will often prevent the commission of error in the first place, or, failing that, will at least permit use of a corrective measure such as an instruction to the jury, as well as reducing the likelihood that there will be further instances of similar errors. See *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3, 512 (1976). In the present case, for instance, where the district court apparently found a constitutional violation produced by the cumulative effect of a number of instances of improper prosecutorial comment, a timely objection might well have been effective to prevent the objectionable statements from being repeated and to cause the trial court to give an instruction reminding

---

[3] "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States, supra*, 321 U.S. at 444.

the jury that the statements of counsel were not to be considered as evidence.

Apart from reducing the likelihood that error will be cured or avoided, the failure to raise any objection is often strong indication that an error that may appear significant on the cold record before a reviewing court was in fact not particularly important or damaging to the non-objecting party.[4]

Because a collateral attack can be made at any time, months or even years after the trial, both the difficulty of adjudication of the legal claim and the consequences of a grant of relief are greatly magnified as compared to the direct appeal setting. Consequently, the justification for enforcing waivers resulting from procedural defaults is even greater on collateral attack than on direct appeal. In some instances, the defendant's procedural default concerns a matter—such as a motion to suppress evidence on Fourth Amendment grounds or to exclude a confession—that can only be resolved by means of an evidentiary hearing. The failure to make a timely request for relief of this nature will often cause serious difficulties in determining the validity of the request long after the critical events have taken place. See *Wainwright* v. *Sykes, supra*, 433 U.S. at 88; see also Rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts. But even if, as here, the errors are gleaned from the face of the trial record, the task of reprosecution if the original conviction is set aside is greatly complicated by problems of unavailable witnesses, misplaced, returned, or destroyed physical evidence, and dimmed memories.

---

[4]This is, in our view, the case with the erroneous jury instruction that provided the basis for collateral relief in *United States* v. *Frady*, 636 F. 2d 506 (D.C. Cir. 1980), petition for cert. pending, No. 80-1595 (filed Mar. 20, 1981).

The foregoing considerations have led this Court to hold that the failure to raise a claim in accordance with legitimate procedural rules will bar consideration of the claim in a collateral attack upon a criminal conviction unless the prisoner can satisfy the "cause and prejudice" standard. Since neither the district court nor the court of appeals applied that standard to respondent's claims, the judgment of the court of appeals cannot stand.

3. As noted above, much of the "flagrant prosecutorial misconduct" referred to by the district court (Pet. App. A-8 to A-11) was not objected to at trial or raised in respondent's motion for a new trial.[5] The lack of objection at trial ordinarily bars appellate relief in Tennessee. By order dated July 6, 1967, the Court of Criminal Appeals of Tennessee adopted "the existing rules of appellate practice of the Supreme Court of Tennessee * * * as the Rules of Practice of the Court of Criminal Appeals of Tennessee" (Tenn. Code Ann., Court Rules (Vol. 5A), at 163 (repl. 1977)). At the time of respondent's trial and direct appeal, Rule 14(4) (Tenn. Sup. Ct. R.) provided in pertinent part as follows (*id.* at 11):

> No assignment of error in any civil or criminal case * * * brought to this Court for review, can be predicated upon any alleged error of the trial court consisting of an omission or affirmative action * * * in the

---

[5]Respondent's "Amended Motion for New Trial" stated that "the improper comments, actions, and arguments of the Attorneys General throughout the entire trial and arguments were such as to inflame the jury and deny the defendant a fair and impartial trial." Not only did this claim come too late to permit correction of any errors during the trial, but so general an assertion is insufficient to preserve the claimed errors for review on direct appeal under Tennessee practice. See, *e.g.*, *State* v. *McKinney*, 603 S.W.2d 755, 759-760 (Tenn. Crim. App. 1980).

Copies of respondent's motion for a new trial and his amended motion have been lodged with the clerk of this Court.

> conduct of the case, unless it affirmatively appears in the record that the omission, action, defect, or error was seasonably called to the attention of the trial judge and ruled on adversely to the plaintiff in error, otherwise the same will be treated as having been waived or cured in the trial court.[6]

Thus, under Tennessee practice, the failure to raise a claim in the trial court in a timely fashion generally bars consideration of the issue on appeal. See, *e.g.*, *Kirby* v. *State*, 214 Tenn. 296, 379 S.W.2d 780 (1964); *Manning* v. *State*, 195 Tenn. 94, 257 S.W.2d 6 (1953); *Sneed* v. *State*, 546 S.W.2d 254 (Tenn. Crim. App. 1976); *Parton* v. *State*, 455 S.W.2d 645 (Tenn. Crim. App.1970).[7] Absent a showing of "cause and prejudice," therefore, the claims should also be barred on collateral attack in federal court pursuant

---

[6]See also Rule 14(5) (Tenn. Sup. Ct. R.): "Error in the admission or exclusion of testimony in charging a jury, * * * misconduct of jurors, parties or counsel, or other action occurring or committed on the trial of the case, civil or criminal, or other grounds upon which a new trial is sought, will not constitute a ground for reversal, and a new trial, unless it affirmatively appears that the same was specifically stated in the motion made for a new trial in the lower court, and decided adversely to the plaintiff in error, but will be treated as waived * * *. This is a court of appeals and errors, and its jurisdiction can only be exercised upon questions and issues tried and adjudged by inferior courts, the burden being upon the appellant, or plaintiff in error, to show the adjudication, and the error therein, of which he complains."

We are informed that the Rules of the Tennessee Supreme Court have been amended, effective January 28, 1981. See 610 S.W.2d No. 4 ((Tenn. ed.) Mar. 17, 1981). We are advised that these amendments make no material change in the rules relevant to this situation. See Rules 3(e) and 36(a), Tennessee Rules of Appellate Procedure (effective July 1979), *reprinted in* Tennessee Rules of Court-1980, at 245-246, 295.

[7]Tennessee happens to have a rule that specifically bars assignment of error on the basis of any claims not properly raised in the trial court. We submit, however, that the cause and prejudice standard should be applicable even if case law rather than a specific rule treats a claim as waived absent timely objection. Cf. *Estelle* v. *Williams*, 425 U.S. 501, 513-515 (1976) (Powell, J., concurring); *id.* at 508 n.3, 512.

to 28 U.S.C. 2254. *E.g., Tyler* v. *Phelps*, No. 79-3093 (5th Cir. Apr. 27, 1981), slip op. 6450, 6455-6457 & n.9 (on rehearing); *Taylor* v. *Harris, supra*. Thus, the only grounds for relief upon which the district court could have properly relied were (1) the limitation on cross-examination and (2) the prosecutor's comments that the interview was "improper" and that respondent's "violent nature" was material (assuming that these occurrences infringed some constitutional guarantee). But, of course, it could not properly grant relief on the basis of those errors without addressing the conclusion of the Tennessee Court of Criminal Appeals that they were harmless.

4. Although the district court did not expressly refer to the "plain error" doctrine, its apparent "quest for error" (*Bihn* v. *United States*, 328 U.S. 633, 638 (1946)) can only be explained on the theory that some form of that doctrine was thought to be properly applicable in this proceeding.[8] We submit that the plain error doctrine has no place in consideration of a collateral attack on a criminal conviction, and that its use would have the effect of obliterating the distinctions between direct and collateral review of criminal convictions, thereby unjustifiably increasing the vulnerability of otherwise final judgments in criminal cases. Moreover, the notion that collateral relief may be granted on the basis of errors that are plain on the face of the record, without regard to the obligations of litigants in our adversarial system to make timely objection to matters deemed erroneous and prejudicial, simply cannot be squared with the decisions of this Court in cases like *Davis*, *Francis*, and *Wainwright*.

---

[8]Fed. R. Crim. P. 52(b) is, of course, inapplicable. See generally Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts.

The plain error doctrine has evolved by rule (*e.g.*, Fed. R. Crim. P. 52(b)) and practice[9] as a power of an appellate court reviewing a criminal conviction on direct appeal, and its application should be confined to its intended context. It allows courts, in the context of trial and direct appeal, to recognize and correct obvious errors notwithstanding a party's failure to make appropriate objection or seek appellate review of the matter. This power may be exercised essentially without regard to the existence of any excuse or justification for the party's dereliction. Plain error is in this respect materially different from the "cause and prejudice" standard, which requires the party seeking collateral relief to provide a satisfactory explanation for any procedural default before the habeas court may consider the merits of a defaulted claim. If plain error may, without more, afford a basis for collateral relief, then the "cause" component of the "cause and prejudice" standard will be eliminated for a substantial class of cases.

It is true that the consequence of barring use of a plain error standard on collateral attack and insisting upon compliance with the cause and prejudice standard will be to limit the availability of collateral relief from final judgments of conviction in criminal cases. But this is as it should be, for direct appeal and collateral attack are fundamentally different remedies. See, *e.g.*, *United States* v. *Addonizio*, 442 U.S. 178, 184-187 & n.11 (1979); *Henderson* v. *Kibbe*, 431

---

[9]Although there does not appear to be any rule authorizing consideration of claims barred by Rules 14(4) and (5) on the basis of "plain error," Tennessee appellate courts do have limited discretion to consider "patent invalidating error," *Harrison* v. *State*, 532 S.W.2d 566, 569 (Tenn. Crim. App. 1975); see *McDonald* v. *State*, 512 S.W.2d 636, 640 (Tenn. Crim. App. 1974); *Pulley* v. *State*, 506 S.W.2d 164, 166 (Tenn. Crim. App. 1973), or "plain error" affecting the fairness or integrity of the proceedings, see *Hawkins* v. *State*, 543 S.W.2d 606, 607 (Tenn. Crim. App. 1976). See generally *Manning* v. *State*, 500 S.W.2d 913, 914-915 (Tenn. 1973).

U.S. 145 (1977); *Stone* v. *Powell*, 428 U.S. 465 (1976). Since "the general rule is that the writ of *habeas corpus* will not be allowed to do service for an appeal," *Sunal* v. *Large*, 332 U.S. 174, 178 (1947), the liberality of the plain error doctrine properly gives way to more stringent standards for access to collateral relief.

Use of the "plain error" standard is particularly inappropriate when a federal court is asked to nullify a state criminal conviction. For such an exercise of power not only impairs society's interest in the effective utilization of scarce judicial resources and in the finality of criminal judgments, but also exacerbates the friction inherent in a federal system and interferes with the constitutional balance implicit in the doctrine of federalism. See *Stone* v. *Powell, supra*, 428 U.S. at 491 n.31; see also *Sumner* v. *Mata*, No. 79-1601 (Jan. 21, 1981) slip op. 10-11 & n.3; *Fay* v. *Noia*, 372 U.S. 391, 463-470 (1963) (Harlan, J., dissenting).[10]

---

[10]There may be exceptional cases in which the number and significance of the claims not raised as required by legitimate procedural rules will be sufficient to indicate that the defendant's trial counsel failed to display the degree of care and competence required of attorneys. In such cases a federal habeas court might properly consider the claims of error notwithstanding the procedural defaults, the attorney's manifest incompetence constituting sufficient "cause." Neither the trial court nor the Sixth Circuit rested its decision on any such ground, which would in any event be of doubtful validity in the circumstances of this case. See J.A. 62-63.

In sum, a federal habeas court does not sit as a surrogate for the state appellate court, reviewing the record for any error that might have been considered on direct appeal. Accordingly, even if an appellate court might properly have considered certain errors pursuant to some doctrine akin to "plain error" on direct appeal, absent a showing of "cause and prejudice" a federal habeas court may not do so. See *Taylor* v. *Harrison, supra*, 640 F. 2d at 2 n.3.[11]

CONCLUSION

The judgment of the United States Court of Appeals for the Sixth Circuit should be vacated or reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

GEORGE W. JONES
Assistant to the Solicitor General

MAY 1981

---

[11] If the state court actually considered and decided the issue notwithstanding a procedural default, other considerations are applicable and the claim may be reviewed. *E.g., Ulster County Court, New York* v. *Allen*, 442 U.S. 140, 148-154 (1979); *Wainwright* v. *Sykes, supra*, 433 U.S. at 80, 87. If the state has a procedural rule that bars assertion of untimely claims and the state courts have not in fact considered the issue, however, the "cause and prejudice" standard is applicable.